117-51

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 936.

THE STATE OF TENNESSEE, APPELLANT,

vs.

THE PULLMAN SOUTHERN CAR COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED SEPTEMBER 10, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Middle District of Tennessee, Circuit Court of the United States for said District.

STATE OF TENNESSEE
vs.
PULLMAN SOUTHERN CAR CO. } No. 2679.

Be it remembered that heretofore, to wit, on the 19th day of April, 1884, a transcript in the above-entitled case was filed in this court, coming from the chancery court of Davidson county, Tennessee, by removal, &c., which transcript of the record in said chancery court is in words and figures following, to wit:

STATE OF TENNESSEE, *Davidson County:*

In Chancery at Nashville.

STATE OF TENNESSEE *vs.* PULLMAN SOUTHERN CAR CO.

At the October Term, 1883, of the chancery court at Nashville the following proceedings were had in the cause wherein the State of Tennessee is complainant and the Pullman Southern Car Company are defendants.

2 *The Bill of Complaint of the State of Tennessee against the Pullman Southern Car Company Original Bill. Filed Dec. 15th*, 1883.

To the Hon'l. A. G. Merritt, chancellor, holding the chancery court for Davidson County at Nashville, Tennessee:

The complainant, the State of Tennessee, represents unto your honor that the defendant is a corporation organized under the laws of Kentucky, and whose chief office is not located in Tennessee, but the defendant does business and operates its cars in and through the State of Tennessee, over various lines of railway, and has its authorized agents at various points in the State, among others, one in the City of Nashville, Davidson county.

Complainant further represents unto your honor that an act was passed in 1877 declaring the running and using of sleeping cars or coaches in Tennessee a privilege, unless the cars belong to the railroad company over whose lines they are run. And complainant states that the defendant is not the owner of any of the railroads in said State, but is operating and running its railroad cars over all, or nearly all, of the railroads in or through the State of Tennessee. That said act provided that each sleeping

3 car company running, owning, or using said cars or coaches shall make a report on or before the first day of May of each year to the comptroller, giving the number of cars so used by them in said State and to pay the privilege tax on or before the 1st day of July thereafter. And complainant states that the amount assessed from 1877 to 1880, inclusive, was fifty dollars upon each car per annum, which was run or used in the State of Tennessee. Compl't further states that, although the law required that a report should be made on or before the 1st day of May of each year, the defendant

has never made but one report, which was on the 22d day of May, 1878, and this was not in compliance with the law; for, instead of reporting the actual number of cars used by them in the State, the report, so far as it bears upon that point, was made to dodge and evade the law, and it is in the following language:

"The actual number of cars required to operate the lines named herein, giving their estimate of the number required to operate the roads in Tennessee, instead of the number actually used, as commanded by the act."

A certified copy of said report is herewith filed as Exhibit A'
4 and as such is made a part of this bill, but need not be copied'
Complainant charges that she is informed and believes that from 1877 down to the present time the defendant has run and used not less than sixty cars in the State of Tennessee, instead of thirty-eight, as reported. But the comptroller, having no other data than the original report, has charged said company on the books with but 38 cars, and P. P. Pickard, the present comptroller, has made various efforts to induce the defendants to make its reports as required by law, but it refuses to do so, or to pay the taxes, as hereinafter stated. And owing to the defendants' failure to report the number of cars used by it the comptroller is not able to collect the taxes in the mode required by said act of 1877, but is forced to file a bill of discovery in order to get the data and the amount due from the defendant. Complainant states that, by an act passed April 7th, 1881, it was provided "sleeping-car companies shall pay an annual tax for each coach of seventy-five dollars," and the defendant has made no report under said last act of the number of cars being used in Tennessee, nor since 1878, as before stated.

5 Complainant further charges that if the statement in the bill that the def't owns and has been using and operating not less than sixty cars in Tennessee; that the amount due to the State from 1877 to 1881 inclusive is twelve thousand dollars, and the defendant has paid but seven thousand and six hundred and seventy-two dollars and forty-one cents, and the balance of said sum, together with the interest from the time it should have been paid, remains due to the State.

Complainant further charges and states that the defendant operated not less than sixty cars during the years 1881 and 1882, no report of which has ever been made to the comptroller, and during said years the privilege tax was seventy-five dollars per car, so that the amount due to the State for the years 1881 & 1882 is forty-five hundred dollars per year, together with the interest from the time the same should have been paid. The entire amount, therefore, due the complainant from the defendant for the years named is more than thirteen thousand dollars, without computing interest.

Complainant, therefore, prays that proper process issue and be served upon defendant, returnable to the first Monday in January, 1884, and that it appear and answer fully each allegation con-
6 tained in this bill, showing particularly the number of sleeping cars actually used by it in Tennessee for each year from

1877 to 1882 inclusive, stating the number of such cars used upon each road running in or through the State. Compl't also prays that in the event it should be necessary to give jurisdiction to your honor's court, that defendant's property be attached upon the grounds of non-residence. Complainant further prays that an account be taken to ascertain the amount due to the State from the defendant, and that the judgment be rendered for the same and for general and special relief.

CHAMPION AND HEAD,
Sol'rs for State.

Pullman Southern Car Co. Arrangement of Through and Local Cars. Feb'y 22, 1878.

EXHIBIT A.

	Cars.
Louisville and Nashville via L. and N. and G. S. R., Pullman sleeping cars northward and southward daily	2
Cincinnati, Louisville and New Orleans, via S. C. and L. L. and N. Evening line Pullman drawing-room cars	5
7 The actual number of conveyances required to operate the lines named herein:	
Cincinnati, Louisville and New Orleans via S. C. and L. L. & N. and G. S. M. M., N. O. & M. R. roads, evening line Pullman drawing-room cars	5
Louisville and Little Rock via L. & N. & G. S. & M. & L. R. railroads, evening line drawing-room cars	4
Louisville & Memphis via L. & N. & G. S. railroad, morning line Pullman cars	3
St. Louis & Milan via St. Louis, A. & T. & Illinois Central, Cairo Transfer, &c ; St. L. and N. O. railroad, evening line daily each way (Illinois Central R. R. furnished 1 car for this line)	1
Washington, Atlanta & New Orleans via A. & W. C., W. C. & M., & G. S., A. M., & O. E. T. & V. & G. W. & A. A. & W. & W. P. W. of A. M. & M. & N. O. & M. railroads, Pullman	
8 cars daily each way	6
Nashville & Memphis via N. C. & St. L. & L., and N. & G. S. railroads, evening line Pullman cars	2
Atlanta, Chattanooga & Nashville via N. C. & St. L. & W. & A. Railroads, evening line Pullman cars	2
Nashville & St. Louis via N. C. & St. L., M. & O. & St. L., S. M. & S. railroads	3
Atlanta & Chattanooga via W. & A. railroad	1
New Orleans & Chicago via C., St. L. & N. O., Cairo Transfer & Ill. Cent. railroads, evening line Pullman drawing-room cars (Ill. Cent. R. R. furnished 2 cars for this line)	4
Total	38

[SEAL.] THOS. H. HAYS, *Gen'l Supt.*

STATE OF TENNESSEE:

COMPTROLLER'S OFFICE.

I, P. P. Pickard, comptroller of the treasury of the State of Tennessee, do hereby certify that the foregoing is a true and correct copy of the report of the No. of cars run through and in this State by the Pullman Southern Car Company as made by their sup't, Thomas H. Hays, to this office Feb'y 22d, 1878, as shown from the original, which is now on file in my office.

Witness my official seal and signature, at office in Nashville, this Dec. 14th, 1883.

[SEAL.]

P. P. PICKARD,
Comptroller.

State of Tennessee to the sheriff of Davidson county, Greeting:

We command you to summon the Pullman Southern Car Company, if to be found in your county, to appear before the chancellor of the chancery court at Nashville at the present court, to be held at the court-house in Nashville on the 1st Monday in January next, it being the 7th day of January, 1884, then and there to answer the original bill of complaint of State of Tennessee against The Pullman Southern Car Company, and further do and receive what our said court shall consider in that behalf; and this you shall in nowise omit under the penalty of the law. Herein fail not, and have you then and there this writ.

Witness Thomas W. Wrenne, clerk and master of our said chancery court, at office in the court-house at the city of Nashville, this first Monday of Oct., 188–, and the 108 year of American Independence.

T. W. WRENNE,
Clerk & Master,
By WM. SMITH, *D. C. & M.*

Endorsed: Came to hand same day issued, and executed by reading the within to Thomas F. Fowler, agt. for the Pullman Southern Car Co., and delivering him a copy of the bill filed in this case this Dec. 19th, 1883. J. L. Price, D. S.

Petition for Removal to U. S. Cir. Court. Filed Feb'y 11th, 1884.

In the Chancery Court of Davidson County, State of Tennessee.

STATE OF TENNESSEE, Compl't,
vs.
PULLMAN SOUTHERN CAR CO., Def't.

To the Hon'l. A. G. Merritt, chancellor, &c., holding the chancery court of Davidson county, Tennessee:

Your petitioners, Pullman Southern Car Company, respectfully show unto your honor that on December 15th, 1883, the State of Tennessee filed its original bill in said court against your petitioners, No. 11040 on the rule docket, praying that petitioners answer and discover the number of sleeping-cars used by

petitioners in Tennessee for each year from 1877 to
11 1882, inclusive; that an account be taken to ascertain the amount of taxes due your petitioners to the State; that judgment be rendered in favor of the State against petitioners for the same and for general and special relief; that petitioners will enter their appearance in said suit at the filing of this petition, but they have filed no demurrer, answer, or other pleading therein, and the April term, 1884, of said court will be the first term at which said suit could by any possibility be tried; that prior to the filing of said bill petitioners were duly incorporated by the General Assembly of the Commonwealth of Kentucky, and therefore were and are citizens of said State of Kentucky; that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the State of Tennessee, the complainant in said suit, is a corporation duly organized under the constitution of the State of Tennessee and of the United States, and therefore the controversy in said suit is between citizens of different States.

Your petitioners offer herewith a bond, with good and sufficient sureties, for their entering in the circuit court of the United
12 States for the middle district [of] Tennessee at Nashville, on the first day of the next session, a copy of the record in this suit, and for paying all costs that may be awarded by said U. S. circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto; and petitioners pray this honorable court to proceed no further herein, except to make the order of removal required by law, to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the middle district of Tennessee; and petitioners will ever pray, &c.

ED. BAXTER,
Sol'r for Petitioner.

STATE OF TENNESSEE, *Davidson County:*

I, Ed. Baxter, being duly sworn, do say: That I am solicitor for the petitioners in the above-entitled case; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

ED. BAXTER.

Sworn to and subscribed before me this 11th day of Feb'y, 1884.

ALEX. B. HOYE,
D. C. & M.

Bond for Removal to U. S. Cir. Court. Filed Feb'y 11th, 1884.

13 Know all men by these presents, that the Pullman Southern Car Company, as *principle*, and Ed. Baxter and Baxter Smith, sureties, are held and firmly bound unto the State of Tennessee in the penal sum of five hundred dollars, the payment whereof well and truly to be made unto the State of Tennessee, we bind ourselves, our heirs, successors, representatives, and assigns, jointly and severally by these presents; yet upon these conditions, the said

Pullman Southern Car Company having petitioned the chancery court of Davidson county, State of Tennessee, for the removal of a certain cause therein pending, wherein the State of Tennessee is complainant, and the Pullman Southern Car Company defendants, to the circuit court of the United States in and for the middle district of Tennessee. Now, if the said Pullman Southern Car Company, your petitioner, shall enter into the said circuit court for the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

14 Witness our hands and seals this the 11th day of Feb'y, A. D. 1884.

PULLMAN SOUTHERN CAR CO.,
By ED. BAXTER.
ED. BAXTER, *Sec'y.*
BAXTER SMITH, *Sec'y.*

Decree 13th Feb'y, 1884.

THE STATE OF TENNESSEE *vs.* THE PULLMAN SOUTHERN CAR CO.

A petition having been filed by the defendants in this cause on the 11th day of February, 1884, praying for the removal thereof into the circuit court of the United States for the middle district of Tennessee, pursuant to the statutes of the United States in such cases made and provided; and the said petitioners having also made and filed with said petition a bond with good and sufficient security for their entering in said circuit court on the first day of its then next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if said circuit court shall hold that this suit was wrongfully and improperly removed thereto. Now, on motion of petitioner's solicitor, it is hereby ordered that this court accept the said bond and surety offered by the petitioners, and that this cause be wholly removed and trans-

15 ferred for trial or other proceedings into said circuit court of the United States for the middle district of Tennessee.

Certificate.

STATE OF TENNESSEE, *Davidson County:*

I, Thomas W. Wrenne, clerk and master of the chancery court of Davidson county, do hereby certify that the foregoing is a full, true, and perfect copy of all the record, papers, and proceedings had and filed in the cause, wherein The State of Tennessee is complainant, and the Pullman Southern Car Company are defendants, as the same now appears of record and on file in my office. In testimony whereof I hereunto set my hand and affix the official seal of said court at office in the court-house at Nashville, this 25th day of Feb'y, 1884, and in the 108 year of our Independence.

_____,
Clerk and Master.

Bill of cost	$2 50
State tax	2 50
County tax: Thomas W. Wrenne, C. G. M., bill, 25c.; spa. to ans., 75c.; copy bill, 1.25; petition for removal, 25c.; aff't, 25c.; notice, 25c.; bonds, 50c.; entering security, 25c.; registering bond, 25c.; decree (18, p. 515), 50c.; order, &c., 1.00	5 50
J. L. Price, D. S., 1 spa.	1 00
B. H. Rains, D. S., 1 notice	50
	$12 00

16 STATE OF TENNESSEE, *Davidson County:*

I, T. W. Wrenne, clerk & master of the chancery court of Davidson county, Tennessee, certify the foregoing to be a full, true, and perfect transcript of the record and bill of cost in the case wherein the State of Tennessee is complainant and Pullman Southern Car Company is defendant, as the same appears of record and on file in my office.

Witness my hand and seal at office at Nashville, Davidson county, Tennessee, this 27th day of Feb'y, 1884.

[SEAL.] THOMAS W. WRENNE,
Clk & Master.

Answer.

On the 17th day of April, 1882, an answer was filed in words and figures following, to wit:

The answer of the Pullman Southern Car Company to the bill filed by the State of Tennessee in chancery court for Davidson county, Tennessee, and removed to the circuit court of the United States for the middle district of Tennessee, sitting in equity at Nashville.

Respondent, saving the benefit of all proper exceptions, for answer unto said bill, or unto so much thereof as it is advised that it is material for it to answer, answering, says:

17 Respondent admits that it is a corporation chartered by and organized under the laws of the Commonwealth of Kentucky, and that its chief office is not located within the State of Tennessee. It is true that respondent runs certain sleeping cars or coaches which have been and are operated over various lines of railway running through the State of Tennessee from points without to points within, and from points within to points without said State; said cars or coaches, however, are not operated, run, or used by respondent, but by the railroad companies over whose lines they pass. Respondent, since 1872, has been engaged in the business of manufacturing railway cars known as drawing-room cars and sleeping cars under certain patents belonging to respondent, and of hiring said cars to railroad companies, respondent receiving therefor certain income or revenue by selling to certain passengers of the railroad companies seats, sleeping births, and toilet accommodations manufactured and used under the patents aforesaid. Respondent hired its cars to the various rail-

road companies under a uniform contract, a sample of which is herewith filed marked "Schedule A," and prayed to be taken
18 as a part hereof, it being a copy of said contract as made with the Louisville and Nashville Railroad Company on June 19th, 1872. All of said contracts were executed by respondent at its chief office at Louisville, in the State of Kentucky. It will be seen from said contract that respondent agreed to furnish the railroad company with drawing-room cars and sleeping cars, to be used by the railroad company for the transportation of railroad passengers, sufficient to meet the requirements of travel over the railroad line, the cars to be satisfactory to the superintendent of the railroad. Respondent agreed to keep the carpets, upholstery, and bedding of the cars in good order and repair, and to renew and improve the same, when necessary, at respondent's expenses, except such of said repairs and renewals as might become necessary by reason of accident or casualty, the railroad company agreeing to repair all damages to said cars of every kind occasioned by accident or casualty. Respondent agreed to furnish at its own expense one or more employés, as might be needful, upon each of said cars, whose duties should be to collect fares for the seats, sleeping and toilet accommodations furnished in said cars and generally
19 to wait upon passengers therein and provide for their comfort, but said employés were to be governed by and subject to such rules and regulations as the railroad company might from time to time establish for the government of its own employés. The railroad company agreed to haul said cars on the passenger trains running over its line; to furnish fuel and material for lighting said cars; to furnish at suitable points rooms and conveniences for airing and storing bedding; to wash and cleanse the cars, and to keep them in good running order and repair, including renewals of worn-out parts and all things appertaining to said cars necessary to keep them in first-class condition, except such repairs as respondent agreed to make, and which are referred to above. The railroad company agreed that respondent should be entitled to collect from each railroad passenger occupying said cars such sums for said occupancy as might be usual on competing lines furnishing equal accommodations, and that such rules and regulations should be mutually agreed upon as would most favor the renting of seats and couches in said cars. The railroad company agreed that respondent might
20 place its tickets for seats and couches for sale in such of the railroad ticket offices as respondent might desire, without charge to respondent for selling the tickets. The cars owned by respondent were carried over the railroads in Tennessee, by locomotives belonging to the railroad companies, in trains owned, officered, and exclusively controlled by said companies. Said companies were and are, by their respective charters and the laws of the State of Tennessee, fully vested with the franchise to transport passengers for hire over their respective railroads, and they pay taxes annually to the State of Tennessee, not only upon the value of that franchise, but also upon the value of all their property, whether real, personal, or mixed, and whether situated in the State of Tennessee

or elsewhere. Under their said charters and the laws aforesaid, said companies are authorized to invite patronage by offering to the travelling public such accommodations for sleep, rest, and comfort as will induce persons to select their lines in preference to others where — such facilities. It was in the exercise
of said franchise that said companies, under the form of
21 contract above referred to, hired of respondent such sleeping cars and such drawing-room cars as were necessary to accommodate their respective passengers. Respondent is not a carrier of passengers. It does not undertake to transport passengers at all. The railroad companies receive all fares paid by passengers for transportation, whether the passengers ride in cars owned by said companies or in cars hired by said companies from respondent. The railroad companies decide what classes of their passengers shall be carried in the cars hired from respondent, and, as a general rule, they permit only such of their passengers as have purchased first-class railroad tickets to ride in the sleeping cars. When a person has purchased from the railroad company a first-class ticket, entitling him to transportation over the railroad, if he wishes a seat or sleeping berth in the cars hired from respondent, respondent is required by the railroad company to furnish him such seat or berth, and is authorized to charge therefor a reasonable compensation. Respondent is to have an employé (usually a conductor) on the
car to receive said compensation from the passengers,
22 and also another employé (usually called a porter) who attends to the seats and berths, and ministers generally to the comfort of the passengers of the railroad company who, for the time being, are using the cars. The seats, berths, and toilet conveniences constituting the interior arrangements of the car, and which alone constitute its advantages over ordinary passenger cars, are constructed under letters patent, numbers 6882 & 6648, duly granted and issued under the Constitution and laws of the United States, and of which respondent has, by contract, the right of use as assignee, and it is for the use of these patented inventions that the railroad passengers pay to the respondent the only compensation it receives from them. The term for which said letters patent were issued has not expired, and they are still in full force, and respondent has the *of* use and enjoyment in the same. Said letters patent are of great value and usefulness; they have not been licensed to others to use, and they have been universally *acquired* in by the public. Further answering, respondent says that, except as above, it does no business in the State of Tennessee, and has no agents to sell seats and
23 berths in said cars, and conductors and porters, whose duties have been stated above. It is true that an act approved March 16th, 1877, by the Legislature of Tennessee declared that "the running and using of sleeping cars on railroads in Tennessee, not owned by the railroads upon which they are run or used," is a privilege, and required "the companies owning and running or using said cars or coaches to report on or before the 1st day of May of each year to the comptroller the number of cars so used by them in this State," and "to pay to the comptroller by the 1st day of July

following $50.00 for each and every of said cars or coaches used or as run over said roads." It is true that respondent is not the owner of the railroads in said State, but as shown above it is not true that respondent "runs or uses" its sleeping cars over all or any of the railroads running into or through said State. It may be true that respondent made only one report, but the report referred to in the bill was made on the 22d day of Feb'y, 1878, and not on the 22d day of May, 1878, as stated by complainant. Respondent denies that it is bound to make any report under the act of March
24 16th, 1877, and for the reason that said act does not require reports, except from companies "owning and running or using" sleeping cars, &c., and it has been shown above that while respondent does own such cars, it does not run or use them, as they are run and used by the railroad companies to whom they are hired. Respondent denies that the report made Feb'y 22d, 1878, was made to dodge or evade the law. At the time said report was made an agreed case between the State of Tennessee and respondent was being prepared respective to a tax claimed for 1877 by the State, and the attention of the attorney general and of the comptroller of the State was called to the fact that sleeping cars sometimes needed repairs or renewals which required that they should be taken into the shops and their places supplied temporarily by other cars. They both agreed that under a fair and proper construction of the law it was only intended to tax upon the number of cars required to operate the lines in Tennessee, and not to tax upon cars which were used only temporarily to take the place of those that were disabled. Respondent admits that a copy of the report, filed as Exhibit "A"
25 to the bill, is a true copy, and respondent denies that there were ever at any one time more of its sleeping-cars used upon the railroads in Tennessee than was stated in said report, though it may be true that more than that number of different cars were used during a current year by substituting one for another when repairs or renewals were required as explained above. Said report stated that 38 cars were required to operate the lines in Tennessee, and the comptroller of Tennessee compelled respondent to pay upon that number for the years 1878, 1879, & 1880, but the payment was made under protest, and respondent has sued to recover back the money so paid. The agreed case above referred to was submitted to the circuit court of Davidson county, and said court decided that there were "subject to taxation under the agreed case cars to the number of thirty-eight, upon which there was due for the year 1877 to the State the sum of $1,900.00, and that of said sum there had been paid $800, leaving due to the State $1,100." It was thereupon adjudged by the court that the State recover of respondent said sum of
26 eleven hundred dollars and the costs of the suit. Upon appeal to the supreme court of Tennessee at Nashville said judgment was affirmed, and it was afterwards paid by respondent in full. Respondent relies upon said judgment and payment as a bar to so much of the bill as seeks to recover taxes from respondent for the year 1877. The comptroller then in office, without calling upon respondent for any other or further report, assumed to assess re-

spondent for taxes for 1878, 1879, & 1880 upon 38 cars, it being the number stated in the judgment rendered in the agreed case, and issued a distress warrant to collect the taxes, amounting to $5,700.00, and as stated above. Respondent paid it under protest and then sued to recover it back. Respondent relies upon said assessments and distress warrant and the payment made under it as a bar to so much of the bill as seeks to recover taxes from respondent for the years 1878, 1879 & 1880. The report above referred to as made Feb'y 22d, 1878, and in which the number of cars used in Tennessee was stated as 38 was erroneous against respondent; for prior
27 to 1881 respondent did not own exceeding 31 cars that were used in Tennessee, and during much of the time in 1878, 1879, & 1880, only 25 of such cars were used in that State.

Respondent denies that it operated any cars in Tennessee during 1881 or 1882, and it denies that it owned more than 35 cars that were operated by the railroad companies in Tennessee during those two years.

Respondent denies that there is due from it to the State of Tennessee from 1877 to 1880, inclusive, $12,000.00, or any amount whatsoever. It also denies that there is due from it to the State for the years 1881–'2 forty-five hundred dollars per year, with interest, or any other amount whatever. It also denies that there is due from it to the State of Tennessee from 1877 to 1882, inclusive, $13,000.00, or any other amount whatever.

Further answering, respondent says that it does no business in the State of Tennessee, except that as the representative of the railroad companies it furnishes seats, sleeping-car berths, and toilet accommodations to the passengers of the railroad companies; that said companies have the right under their charter franchise to fur-
28 nish said accommodations to their passengers, either in their own cars or to hire cars from respondent for that purpose, and to employ respondent to attend to them; that respondent gets its privilege to furnish said accommodations to said passengers from the said railroad companies and not from the State of Tennessee, and as said State has already been paid taxes by said railroad companies on the value of their said respective franchises it has no right to tax respondent for acting under those franchises as the representative of the railroad companies. The fares which respondent is allowed by the railroad companies to collect from the railroad passengers for seats, berths, and toilet accommodations is simply a mode agreed upon by said respondent and said companies for compensating respondent for the expense and trouble of waiting upon said passengers, and for furnishing them the use of the patented inventions aforesaid.

Said sleeping-cars or coaches so owned by respondent were during the years 1878, 1879, 1880, 1881, 1882, 1883 (with the exception of two cars used between Nashville and Memphis), run, used, and employed by said railroad companies in interstate commerce,
29 the said cars being used in transporting passengers from points without to points within, and from points within to points without, the State of Tennessee. The requirements of mod-

ern interstate commerce imperatively demand that persons travelling long distances shall be furnished with suitable accommodations for sleeping and resting, and the receipts from sleeping-car passengers whose journeys are restricted to the limits of the State of Tennessee amount annually to much less than the privilege tax per car, claimed by the State of Tennessee under the statute referred to in the bill, and if those statutes can be enforced against respondent by the State it will amount to a practical prohibition against respondent furnishing sleeping-car accommodations upon any of the railroads operated in the State of Tennessee.

Respondent submits that "the running and using of sleeping-cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used," is not a privilege in the sense in which that word is used in article II, section 28, of the constitution of the State of Tennessee; and that the Legislature of Tennes-
30 see has no power to tax any occupation as a privilege which was not a privilege in the sense of that word, as used in the section of the constitution just referred to, and respondent insists, with the utmost confidence, that the Legislature of Tennessee has no power to tax as a privilege the occupation of furnishing sleeping-car accommodations to interstate passengers. The act of M'ch 16, 1877, referred to above, undertakes to declare that the running and using of sleeping-cars or coaches on railroads in Tennessee not owned by the railroads upon which they are run or used shall be a privilege, and the companies owning, running, or using the same are subjected to a privilege tax; but neither that act nor any other statute of the State of Tennessee imposed any privilege tax upon railroad companies running and using sleeping-cars or coaches upon their roads, provided such cars or coaches were owned by said railroad companies. This was unequal and unjust discrimination in favor of such railroad companies of the State of Tennessee as owned the sleeping-cars or coaches which were run or used upon their own roads, as was the case of the New Orleans, St. Louis & Chicago Railroad Co., and the Memphis and Charleston R. R. Co., and the East Tennessee, Virginia and Georgia Railroad Company, all three
31 of which railroad companies ran and used sleeping-cars or coaches on their railroads in Tennessee during the years 1878, 1879, 1880, 1881, 1882, and 1883.

Article II, section 17, of the constitution of the State of Tennessee, provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title. The act of March 9th, 1877, referred to above, violates this provision of the constitution, in that it declares the mode and manner of valuing the property of telegraph companies for taxation, as well as the mode and manner of taxing sleeping-cars. Respondent submits that the act approved March 16th, 1877, referred to above, was repealed by an act approved April 7th, 1881, chap. cxlix of the acts of Tennessee Legislature, passed at its first session in 1881, and that no proceedings can now be had to collect taxes under said act of 1877. Said act of Ap'l 7th, 1881, under which the tax was reduced to $50.00 for each sleeping-car, was itself repealed by an act of said

Legislature approved March 30th, 1883, and when the bill in this case was filed there was no law in force under which proceedings could be had to collect taxes under said act of April, 1881.

32 Respondent having fully answered, prays to be hence dismissed, with its reasonable costs.

ED. BAXTER,
Sol'r for Respondent.

We waive the signature of the president and sec'y, and the corporate seal of the Pullman Southern Car Company, and agree that this answer may be filed and treated as if formally authenticated.
Ap'l 17th, 1884.

CHAMPION AND HEAD,
Sol'rs for Compl't.

Endorsed: Filed Ap'l 17th, 1884. Lewis T. Baxter, cl'k, by Chas. Wash, dep'y clk.

Opinion of the Court.

PULLMAN SOUTHERN CAR COMPANY *vs.* JAMES N. NOLAN, Comptroller. } No. 2582. At law.

PULLMAN SOUTHERN CAR COMPANY *vs.* MONTGOMERY COUNTY *et als.* } No. 2591. In equity.

and

33 STATE OF TENNESSEE *vs.* PULLMAN SOUTHERN CAR CO. } No. 2679.

The first of these causes is an action at law to recover back an amount alleged to have been illegally exacted as taxes, a statute of the State authorizing such a suit, and the plaintiff being a citizen of Kentucky, it is submitted for decision upon a general demurrer to the declaration. The record is a bill in equity, the object of which is perpetually to enjoin the defendants, the counties of Montgomery, Stuart, Houston, Robertson, Sumner, and Davidson, from collecting taxes, which they assert the right to collect, of the same description as those involved in the action against the comptroller.

The third suit is a bill in equity filed by the State of Tennessee seeking to compel a discovery from the defendant of the number of cars used by it claimed to be subject to the tax in question, and to recover and collect the amount of tax due thereon. This suit was commenced in the chancery court of Davidson county, but was removed into this court on the application of the defendant.

34 All three cases involve and depend upon a single question.

The constitution provides, art. II, sec. 28, that "all property, real, personal, or mixed, shall be taxed, but the Legislature may except such as may be held by the State by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, chari-

table, scientific, literary, or educational; and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the Legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct."

That constitution also provides, art. II, sec. 29, that "*that*
35 the General Assembly shall have power to authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes respectively in such manner as shall be prescribed by law, and all property shall be taxed according to its value upon the principles established in regard to State taxation."

On March 16th, 1877, the General Assembly of Tennessee passed an act entitled "An act declaring the mode and manner of valuing the property of telegraph companies for taxation, and of taxing sleeping cars, the sixth section of which is as follows: 'That the running and using of sleeping cars or coaches on railroads in Tennessee not owned by the railroads upon which they are run or used is declared to be a privilege, and the companies owning and running or using said cars or coaches are required to report on or before the 1st day of May of each year, to the comptroller the number of cars so used by them in this State; and they shall be required to pay to the comptroller by the 1st day of July following $50.00 for each and every one of said cars or coaches used or so run over said roads; and if the said privilege tax herein assessed be
36 not paid as aforesaid, the comptroller shall enforce the collection of the same by distress warrant.'"

The Pullman Southern Car Company is a corporation created by the laws of Kentucky, with its principal office and place of business in Louisville, in that State. It manufactures sleeping cars and drawing-room coaches, and furnishes them to railroads under contracts for that purpose, retaining the ownership and receiving compensation by the sale of tickets to passengers desiring such accommodations. It has such arrangements with various railroad companies in Tennessee, on and over whose roads its cars are run and used in carrying passengers into the State from points out of it, and out of the State from points within it, and across the State between points in other States, as well as between points wholly within it. Two only of such cars are used exclusively for carrying passengers between points wholly within the State, and as to them, no question is made. In respect to all others, it is claimed that the tax is invalid as a regulation of interstate commerce, the exclusive right to regulate which is expressly confided by the Constitution to the Congress
37 of the United States. The tax, it is not denied, is what is known to the constitution and laws of Tennessee as a privi-

lege tax. It is not a property tax, for the terms of the State constitution — that must be based on value; whereas this is an arbitrary charge fixed by legislation itself, without regard to the actual or comparative value of the article which is the basis of the tax. A reference to repeated decisions of the supreme court of Tennessee leaves no room to doubt what constitutes a "privilege," as a subject of taxation, under the constitution and laws of the State. "The first legislature, after the formation of the constitution," said that court in French *vs.* Baker, 4 Sneed, 193, "acted upon the idea that any occupation which was not open to every citizen, but could only be exercised by a license from some constituted authority was a privilege, and it is presumed this is a correct definition of the term." In Mayor of Columbia *vs.* Yurest, 3 Head, 414, the keeping of a livery stable was held not to be a privilege because the legislature had not so declared it. "A privilege," said the court, in Jen-
38 kins *vs.* Ewing, 8 Heisk, 456, "is the exercise of an occupation or business which requires a license from some proper authority, designated by some general law, and not free to all or any without such license."

"There is a clear distinction recognized," says the supreme court of Georgia, in Home Insurance Co. *vs.* Augusta, 50 Ga., 530, "between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. A license is a right granted by some competent authority to do an act which without such authority would be illegal. A tax is a rate or sum of money assessed upon the person, property, business, or occupation of the citizen." And this principle, it is said by counsel for the State in argument, has been repeatedly recognized by the supreme court of Tennessee. As early as in 1839, in the case of Robinson *vs.* Mayor of Franklin, 1 Hamp., 232, the court says: "The legislature may tax privileges in what proportion they choose, and so may municipal corporations, provided the inequality be not such as
39 to make it oppressive upon a particular class of the community." It results, therefore, that in Tennessee the Legislature may declare the right to carry on any business or occupation to be a privilege to be purchased from the State upon such conditions only as the law may prescribe, to engage in and pursue which, without compliance therewith, is illegal. In the present case "the running and using of sleeping cars or coaches on railroads in Tennessee not owned by the railroads upon which they are run or used is declared to be a privilege." The condition upon which it may be obtained and exercised is the payment of an annual tax of seventy-five dollars for every car so run and used. If that condition is not complied with, such running and using of sleeping cars or coaches is forbidden and is unlawful. The right to attach this condition involves the right to attach any others the Legislature may see fit to adopt, and the question of the right to impose this tax as a condition of the exercise of the privilege resolves itself into the broader question of the right to prohibit it altogether, for that which
40 the Legislature may license it may forbid; indeed, it is forbidden until it be licensed. The question thus reduced be-

comes one, not of the limitations upon the taxing powers of the State, but upon its power to declare the business of the company as carried on, upon and across the territory, a privilege, or to forbid it altogether. "Beyond question," said Mr. Justice Clifford, delivering the opinion of the Court in Transportation Company *vs.* Wheeling, 99 U. S. 273–279, "these authorities show that all subjects over which the sovereign power of a State extends are subjects of taxation, the rule being that the sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, except those means which are employed by Congress to carry into execution the powers given by the people to the Federal Government, where laws made in pursuance of the constitution are supreme." And according to the decision in Crandall *vs.* Nevada, 6 Wall., 35, the power of the States, whether exerted in the form of taxation or otherwise, is still further limited so as not to deny or impair any rights belonging to citizens of the United States, such as by
41 virtue of the Constitution, as in that case, the right of the people to pass and repass into, through, and out of any State without interruption. In that case Mr. Justice Miller delivering the opinion of the court, after commenting on the case of McCullough *vs.* Maryland, said, p. 46: "It will be observed that it was not the extent of the tax in that case which was complained of, but the right to levy any tax of that character. So in the case before us it may be said that a tax of one dollar for passing through the State of Nevada by stage coach or railroad cannot sensibly effect any function of the Government, or deprive a citizen of any valuable right. But if the State can tax a railroad passenger one dollar it can tax him one thousand dollars. If one State can do this so can every other State. And these one or more States covering the only practicable routes of travel from the East to the West, or from the North to the South may totally prevent or seriously harden all transportation from — part of the country to the other."

In the case of the State Freight Tax, 15 Wall., 232, 280, it was distinctly declared that the transportation of passengers or
42 merchandize through a State, or from one State to another, was a subject of the exclusive jurisdiction of Congress, and that a State could not directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation. And in Almy *vs.* The State of California, 24 Howard, 169, as explained in Woodruff *vs.* Parham, 8 Wall., 123–138, it was decided that a stamp tax imposed by State authority upon bills of lading for the transportation of gold and silver from any point within the State was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another which is within the rule laid down in Crandall *vs.* Nevada, 6 Wall., 35, and with the authority of Congress to regulate commerce among the States. If a tax upon the persons or thing carried is a regulation of commerce forbidden to the States, it seems impossible to escape the conclusion that a tax imposed as the price of the privilege of being carried is equally such a regulation. It is im-

material whether the privilege granted or withheld is at-
43 tributed to the carrier or to that which he is engaged in carrying. In both cases it is a burden upon the act of transportation and a tribute livied directly upon commerce itself. In the language of Mr. Justice Strong, delivering the opinion of the court in the case of the State Freight tax, 15 Wall., 232–281: "Interstate transportation of passengers is beyond the reach of a State legislature. * * * We regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation." The case is to be distinguished from that of Osborne *vs.* Mobile, 16 Wall., 479, where the subject of the tax was not the act of transportation itself, but a general business carried on within the State by a resident citizen thereof, which included the making of contracts for transportation beyond the limits of the State. Nor is it within the decision in the case of Wiggins, Ferry & Co. *vs.* East St. Louis, 107 U. S., 365, where the point ruled was that the levying of tax upon vessels or other water craft, or the exaction of a license fee by the State within
44 which the property subject to the exaction has its *situs* is not a regulation commerce within the meaning of the Constitution of the United States, although the property is employed in foreign interstate commerce. In the present case the Pullman Southern Car Company, a corporation of Kentucky, has no domicil in Tennessee, and is not personally subject to its jurisdiction for purposes of taxation; and the sleeping-cars which it runs and uses upon the railroads of that State in the transportation of passengers into and from it, from and to other States have no *situs* within that State for purposes of taxation. They are not brought into the State for the purpose of being employed in a business carried on within it, and do not become a part of the mass of property within the jurisdiction of the State for purposes of taxation. They are in the State only as passing to and from it while in the act of transportation performed by virtue of a right secured by the owners of them; not by the authority of the laws of Tennessee, but by a virtue of a right secured by the exclusive jurisdiction of Congress under the Constitution. It has been suggested that these sleeping-cars
45 do not really perform any office in the act of transportation, but may be likened rather to hotels or inns on wheels, and like other hotels or inns subject to regulation and license by the State. But the refinement is too subtile to be sound. Even regarded as such hotels or inns on wheels, propelled by steam power over railroad tracks, receiving and delivering travellers at points widely separated in distance, would properly be considered, still, as vehicles of transportation, and their use in that way would be commerce.

The conclusion reached from these considerations is that a tax upon the running and using of sleeping-cars or coaches on railroads in Tennessee not owned by the railroads upon which they are run or used as a privilege is equivalent to a concession that the State may regulate it in all other respects or forbid it altogether; that consequently it is a regulation of commerce among the States when ap-

plied to such cars employed in interstate transportation, and in that application contrary to the Constitution of the United States, and therefore null and void.

46 In accordance with this opinion judgment and decrees will be entered in these cases as follows:

1st. In No. 2582 the action against the comptroller to recover the taxes paid under protest as illegaliy exacted the demurrer will be overruled and judgment rendered for the plaintiff for such amount as may be agreed on or otherwise ascertained.

2. In No. 2591 a decree will be rendered finding the equity of the cause with the complainant and granting the relief prayed, enjoining the several county authorities from proceeding further in the collection of the tax.

3. In No. 2679 the bill of the State will be dismissed for want of equity.

STANLEY MATTHEWS,
Associate Justice.

Filed Oct. 20th, 1884.

LEWIS T. BAXTER,
Clk U. S. Cir. Court.

Upon the minutes the following entries appear, of day and date as follows:

On the 4th day of August, 1884.

STATE OF TENNESSEE
vs.
PULLMAN SOUTHERN CAR CO. } No. 2679.

(4 other cases heard with this one.)

These five cases were argued by counsel and taken under advisement by the court until the next term.

47 On Oct. 22d, 1884, the following proceedings were had:

Final Decree.

STATE OF TENNESSEE
vs.
PULLMAN SOUTHERN CAR CO. } 2679. In Equity.

This cause was set for hearing upon the bill and answer by the plaintiff, and the same was so heard at the last term of this court, when the same was argued by counsel and taken under advisement by the court; and the cause coming on now to be heard, as well as upon a former day of the present term, the court is pleased to adjudge and decree that there is no equity in complainant's bill for the reasons set out in the opinion of the Honorable Stanley Matthews, associate justice, which is filed in this cause, and is hereby made a part of this decree. The bill is dismissed, and the State of Tennessee and defendant will each pay one-half the costs of this cause, for which let *fi. fa.* issue.

The defendant admitting in the bill that two of its cars have been

run between points wholly within the State for the years 1881 & 1882, the court is pleased to decree that it pay the taxes upon the same due to the complainants for said years, to wit, the sum of
48 $300, into the office of the clerk of this court. And if the same is not paid within (30) thirty days, execution will issue therefor.

From the foregoing decree the complainant prays an appeal to the Supreme Court of the United States, which the court was pleased to grant upon its giving bond and security, as required by law.

On Oct. 30th, 1884, the following proceedings were had:

STATE OF TENNESSEE
vs.
PULLMAN SOU. CAR CO. } No. 2679.

This cause came in to be again heard before the Hon'l. D. M. Key, judge, &c., upon the motion of complainant's counsel to modify the decree heretofore rendered in this cause at the present term of this court, so as to allow interest upon the amounts found due from the time of maturity; also upon the motion to allow the penalty of double the amount of the privilege tax. The court being of the opinion that the first is well taken, the same is allowed, and said judgment so modified as to add the interest, amounting to $50.50, to the judgment, so that the entire judgment will be three hundred and fifty $\frac{50}{100}$ dollars, and one-half the costs of suit. It is,
49 therefore, ordered, adjudged, and decreed by the court that the complainant recover of the defendant three hundred and fifty $\frac{50}{100}$ dollars and half the costs of this suit, for which execution may issue. The other motion to recover the penalty, not being well taken, is disallowed by the court.

And on Nov. 24th, 1884, the following entry was made:

STATE OF TENNESSEE
vs.
PULLMAN SOUTHERN CAR CO. } 2679.

In this cause it is agreed by counsel that the appeal heretofore prayed shall be vacated and this cause shall await and abide by the decision of the Supreme Court in the case of the Pullman Southern Car Company against James N. Nolan, comptroller, which will be taken up by writ of error from a decision rendered at the present term of this Court—that is, so far as the questions involved in the two cases are the same, the decision of the Supreme Court in said Nolan case shall be binding in this and that this cause shall remain here for such further action as may be necessary after the decision of said Nolan case.

CHAMPION AND HEAD,
Sol'rs for the State.

ED. BAXTER,
Sol'r for Pullman Sou. Car. Co.

50 And on the 29th day of December, 1884, the following proceedings were had:

STATE OF TENNESSEE
vs. } 2679.
PULLMAN SOUTHERN CAR CO.

In this cause the consent decree heretofore entered at this term of the court agreeing to vacate the appeal, formerly prayed and granted from the final decree previously entered, is, by consent of counsel, set aside and the appeal and first decree reinstated as if the consent decree of November had never been entered. It is further agreed that this decree shall operate as notice upon the Pullman Southern Car Company of complainant's intention to perfect the appeal as at first prayed and granted, except as to that part of the decree rendering a judgment for the taxes due from the two cars running between Nashville and Memphis for ($350.50) three hundred and fifty and $\frac{50}{100}$ dollars, rendered Oct. 20th, 1884, from which no appeal is prayed.

51 Circuit Court of the United States for the Middle District of Tennessee.

STATE OF TENNESSEE *vs.* PULLMAN SOUTHERN CAR COMPANY.

Whereas lately at a term of the United States circuit court for the middle district of Tennessee, in a suit depending in said court between the State of Tennessee, as complainant, and the Pullman Southern Car Company, as defendant, a decree was rendered against the said complainant, directing the dismissal of the bill as to the taxes claimed upon the cars run or used within the State, except as to the cars run exclusively within the State, and the said complainant having prayed and obtained an appeal to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record in said Court in said cause in the office of the clerk
52 of the Supreme Court of the United States to reverse the said decree in the aforesaid suit:

Now, we, J. W. Allen and Leon Trousdale, Jr., of the county of Davidson and State of Tennessee, undertake and bind ourselves to pay or cause to be paid to Jas. H. McKenney, clerk of the Supreme Court of the United States, or his successor in office, all fees that shall accrue to him, the said clerk, and be charged to said State of Tennessee in the prosecution of said appeal.

Witness our hands this the 28th day of July, 1885.

J. W. ALLEN.
LEON TROUSDALE, JR.

Approved.

D. M. KEY,
U. S. Dist. Judge, &c.

Personally appeared before me, N. Baxter, clerk of the Supreme Court, the undersigned, J. W. Allen and Leon Trousdale, Jr., and

made oath that they and each of them are worth the amount of said bond.

Nashville, July 28, '85.

J. W. ALLEN,
LEON TROUSDALE, JR.

53 Sworn to and subscribed before me this 28th July, 1885.
NATHANIEL BAXTER,
Clk S. C. Tennessee.

54 UNITED STATES OF AMERICA, *Middle District of Tennessee:*

I, Lewis T. Baxter, clerk of the circuit court of the United States for the middle district of Tennessee, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the case of The State of Tennessee *versus* Pullman Southern Car Co., as the same remain of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at office in Nashville, this 28 day of July, A. D. 1885, and of the Independence of the United States the 110 year.

[Seal Circuit Court of U. S., Middle District of Tenn.]

LEWIS T. BAXTER, *Clk*,
By CHAS. NASH, *Dep'y Clk.*

$13.30, cost of transcript, paid by P. P. Pickard, comptroller, &c.

[Seal Circuit Court of U. S., Middle District of Tenn.]

LEWIS T. BAXTER, *Clk*,
By CHAS. NASH, *D. C.*

Endorsed on cover: M. Tennessee, C. C. U. S. No. 936. The State of Tennessee, appellant, *vs.* The Pullman Southern Car Company. Filed September 10, 1885.

117-34+51

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 936.

THE STATE OF TENNESSEE, APPELLANT.

vs.

PULLMAN SOUTHERN CAR COMPANY.

MOTION TO ADVANCE.

The State of Tennessee, plaintiff in error, through her attorney general, B. J. Lea, and S. A. Champion, special counsel, moves the court to advance this cause upon the docket, and hear it in preference to any civil cause pending in this court between private parties, at a stated time during the present term.

This motion is based upon Section 949 of the Revised Statutes, which is as follows:

"Where a State is a party, or the execution of the revenue laws of a State is enjoined or stayed in any suit in a court of the United States, such State, or the party claiming under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient cause, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties."

The plaintiff in error begs leave to submit, in connection with this motion the accompanying brief and statement giving the reasons why the cause should be so advanced.

B. J. LEA,
Attorney General for the State of Tennessee.
S. A. CHAMPION,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

THE STATE OF TENNESSEE, Appellant,
vs.
THE PULLMAN SOUTHERN CAR COMPANY. } No. 936.

Mr. ED. BAXTER, *Attorney for Defendant.*

On Monday, Dec. 14, 1885, the State of Tennessee will, through her counsel, move to advance this cause upon the docket and have it heard in preference to civil causes pending in said court at a stated time during the present term.

The motion will be based upon Section 949 of the Revised Statute, which is as follows:

"Where a State is a party, or the execution of the revenue laws of a State is enjoined or stayed in any suit in a court of the United States, such State or the party claiming under the revenue laws of the State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient cause, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties."

B. J. LEA,
Attorney General for the State of Tennessee.
CHAMPION & HEAD,
Special Counsel for the State.

STATE OF TENNESSEE, Appellant.
vs.
THE PULLMAN SOUTHERN CAR COMPANY.

NOTICE.

Service accepted Dec. 5, 1885.

ED BAXTER,
Solicitor of Record for Defendant.

117-3 4+51

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 933.

P. P. PICKARD, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, *Plaintiff in Error,*

vs.

PULLMAN SOUTHERN CAR COMPANY.

MOTION TO ADVANCE.

P. P. Pickard the present comptroller of the Treasury of the State of Tennessee, through B. J. Lea, attorney general of the State, and S. A. Champion, special counsel, moves the court to advance this cause upon the docket, and hear it in preference to any civil cause pending in this court between private parties, at a stated time during the present term.

This motion is based upon Section 949 of the Revised Statutes, which is as follows:

"Where a State is a party, or the execution of the revenue laws of a State is enjoined or stayed in any suit in a court of the United States, such State, or the party claiming under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient cause, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties."

The plaintiff in error begs leave to submit, in connection with this motion the accompanying brief and statement giving the reasons why the cause should be so advanced.

B. J. LEA,
Attorney General for the State of Tennessee.
S. A. CHAMPION,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

P. P. PICKARD, Comptroller of the Treasury of the State of Tennessee. *Plaintiff in Error,*
vs.
THE PULLMAN SOUTHERN CAR COMPANY.

No. 933.

Mr. ED. BAXTER, *Attorney for Defendant.*

On Monday, Dec. 14, 1885, the State of Tennessee will, through her counsel, move to advance this cause upon the docket and have it heard in preference to civil causes now pending in said court at a stated time during the present term.

The motion will be based upon Section 949 of the Revised Statutes, which is as follows:

"Where a State is a party, or the execution of the revenue laws of a State is enjoined or stayed in any suit in a court of the United States, such State or the party claiming under the revenue laws of the State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient cause, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties."

B. J. LEA,
Attorney General for the State of Tennessee.
CHAMPION & HEAD,
Special Counsel for the State.

P. P. PICKARD, *Complainant,*
vs.
THE PULLMAN SOUTHERN CAR COMPANY.

NOTICE.

Service accepted Dec. 5, 1885.

ED. BAXTER,
Solicitor of Record of Defendant.

117-340

DEC
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 188

Nos. 933 and 936.

P. P. PICKARD, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, PLAINTIFF IN ERROR,

vs.

THE PULLMAN SOUTHERN CAR COMPANY,

AND

STATE OF TENNESSEE, APPELLANT,

vs.

THE SAME.

B. J. LEA,
Attorney General for the State of Tennessee.
S. A. CHAMPION,
Special Counsel for the State.

Supreme Court of the United States.

OCTOBER TERM, 1882.

Nos. 933 and 936.

P. P. PICKARD, Comptroller of the Treasury of the State of Tennessee, Plaintiff in Error,

vs.

THE PULLMAN SOUTHERN CAR COMPANY,

AND

STATE OF TENNESSEE, Appellant,

vs.

THE SAME.

STATEMENT.

In 1877 the Legislature of Tennessee passed an act the 6th section of which is as follows:

"That the running and using of sleeping cars or coaches on railroads in Tennessee not owned by the railroads upon which they are run or used is declared to be a privilege, and the companies owning and running or using said cars or coaches are required to report on or before the 1st of May each year to the comptroller the number of cars so used by them in this State; and they shall be required to pay to the comptroller by the 1st of July following $50 for each and every one of said cars or coaches used or so run over said

roads; and if the said privilege tax herein assessed be not paid as aforesaid, the comptroller shall enforce the collection of the same by distress warrant."

On February 22, 1878, the Pullman Southern Car Company made a report, showing 38 cars required, without stating the number actually in use.

The comptroller claimed the taxes for 1877, and an agreed case was tried before Chancellor W. F. Cooper, of Nashville, who decided that the act was valid in an exhaustive and able opinion. (See Cooper's Chancery Reports, volume 3, page 587.) The cause was appealed to the supreme court of the State and affirmed by a unanimous court, but no written opinion was delivered.

The defendant made no other report, but paid on thirty-eight cars for 1878, '79, '80 under protest, and brought suit in the United States circuit court at Nashville to recover the money back. The company refused to pay for subsequent years. The Legislature increased the taxes in 1881 to $75 per car. In 1884 the State filed a bill in the chancery court at Nashville, charging that the defendant had been using at least sixty cars in the State from 1877 to 1883, inclusive, and praying that the company be required to disclose the facts as provided by the act of 1877, praying also for an account and a decree for the amount found due. This suit was removed to the United States circuit court, and by consent of parties both causes were heard together, the one being the Pullman Southern Car Company *vs.* J. N. Nolan, comptroller of the treasury, and the other the State of Tennessee against The Southern Pullman Car Company. These suits thus consolidated were heard in May, 1884, but not decided until October thereafter, when a decree in both cases was

rendered adverse to the State, and from which a writ of error was prosecuted in the one and an appeal in the other. As the causes were heard together below, it is expected they will be so heard by this court.

The only question involved is the validity of the section of the act above cited. The Pullman Southern Car Com- insist that it is engaged in interstate commerce, and that the act is therefore violative of the Constitution of the United States. Nothing has been collected from these companies since 1880, and the Legislature in 1885 increased the privilege to $250 per car, in lieu of all other taxes, so that there is now a considerable sum due the State.

BRIEF.

The act of Congress of June 30, 1870, section 949 of Revised Statutes, is as follows: "When a State is a party, or the execution of the revenue laws of a State is enjoined or stayed in any suit in a court of the United States, such State or the party claiming under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed in preference to any civil cause pending in such court between private parties."

These suits, like the Illinois railroad tax cases, involve the constitutionality of the laws of the State, and under these laws all of the property of sleeping-car companies doing business in the State is sought to be taxed, and like that case the State courts decided in favor of the validity of the law, and the circuit court of the United States against it.

One of these suits was commenced in the State courts, and may have been finally determined by the supreme court of

the State at its December term, 1884, had jurisdiction been retained. Tennesse Code, section 738, provides: "In all cases motions or suits in favor of the State shall have precedence over other causes on the dockets of any of the courts."

To one of these suits the State is a party, and her revenue officer is a party to the other, so that they both fall within the intention of the act of Congress.

Under the present revenue act the annual income from the defendant alone would be $15,000 if there are sixty cars in use, as charged in the bill, and the State will derive nothing from this source until this litigation is settled.

In *Davenport City* vs. *Dows*, 15 Wall., 390, the court say: "Congress seems to have intended to give to the State the right to preference in hearing when itself a party to a cause pending in this court, and a like preference when the execution of the revenue laws of a State is enjoined or suspended to any party claiming under such laws. This preference is given, plainly enough, because of the presumed importance of such cases to the administration and internal welfare of the States, and because of their dignity as equal members of the Union."

In *Ward* vs. *State of Maryland*, 12 Wall., 163, the motion to advance was refused, because not made in behalf of the State; and in *Miller* vs. *The State*, 12 Wall., 159, the motion was refused, because the suit involved private interests alone. The court say: "Although a suit be nominally by a State as the plaintiff, yet where the real plaintiffs are individuals, the court will not advance the hearing, even by consent of counsel on both sides." To the same effect *Sage* vs. *Central Railroad Company*, 93 U. S., 412.

In *Hoge* vs. *The Richmond and Danville R. R. Co.*, 93 U. S. 1, the execution of the revenue laws of the State was enjoined at the suit of a stockholder upon the ground that the property of the railroad company was exempt from taxation by the terms of its charter. The motion to advance was made by the attorney general of the State. The court refused the motion to advance, because "sufficient reason" therefor had not been shown.

The court say: "The injunction operates only upon the property of a single corporation. The value of the property or the amount of the revenue to be derived from it is not shown. No question affecting the power of the State to tax other property is involved. The only dispute is as to the liability of the property of this single owner to taxation. The actual amount in controversy may be, and probably is, much less than that in very many other cases waiting their turn to be heard in the regular call of our docket. No disputed principle of law affecting any other case is, so far as we can discover from the record, presented for our determination."

The anxiety felt by the State of Tennessee is made to appear from a resolution passed in 1885—March 10—which is as follows:

"Whereas the cases of the State of Tennessee *vs.* Pullman Southern Car Company, and Pullman Southern Car Company *vs.* James N. Nolan, comptroller, and State of Tennessee *vs.* Geo. K. Whitworth, trustee, etc., are now pending in the Supreme Court of the United States at Washington, and are all causes involving the collection of revenue alleged to be due the State of Tennessee; therefore,

Be it resolved by the General Assembly of the State of Tennessee, That the attorney general of the State is hereby directed to present to the Supreme Court of the United States

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Be it resolved by the General Assembly of the State of Tennessee, That the attorney general of the State is hereby directed to present to the Supreme Court of the United States

a request to advance all of said causes upon the docket, in order that they may be heard and disposed of as soon as practicable."

Also an act authorizing the funding board to borrow money, which is hereto attached as Exhibit A.

In the case of *Keith* vs. *Clark* (97 U. S., 454) this Court held that the State of Tennessee was obliged to receive for taxes the notes issued by the Bank of Tennessee subsequent to May 6, 1861, unless it could be shown that said notes had been issued in aid of the rebellion, and that the burden of proof was on the State to show that the notes had been so issued.

Upon a second trial the State court held that the notes were not issued in aid of the rebellion, and this decision was affirmed by this Court in *Clark* vs. *Keith* (106 U. S., 464) at the October term, 1882.

Thereupon the Legislature passed an act providing for the funding of the notes into certificates, receivable for taxes and all dues to the State. So much of said act as relates to this question is hereto attached as Exhibit B.

The receivability for taxes of the post notes and notes of a less denomination than $5, which were excluded from the act of 1883, was declared by the supreme court of Tennessee, and the Legislature in 1885 passed an act providing for the funding and receiving of these notes on the same terms as prescribed in the act of 1883.

Under the act of 1883 there have been funded into certificates $650,000 of these notes, and under the act of 1885 there will be funded at least $300,000 of post notes and notes under $5.

It will thus be seen that nearly $200,000 of the revenue of the State is receivable in these certificates, or about one-fifth of the total revenue.

It is therefore insisted that these causes shall be heard out of their order at the present term of the Court.

B. J. LEA,
Attorney General for the State of Tennessee.

S. A. CHAMPION,
Special Counsel for the State.

EXHIBIT A.

Chapter 3.

An act to effectuate the funding act of 1883, chapter 84, approved March 28, 1883, and to provide for the prompt payment of the interest coupons upon bonds funded and to be funded under said act by authorizing the funding board to borrow money therefor, and to repeal section 223 of Milliken & Vertrees' Code.

Whereas the decision of the supreme court of Tennessee declaring the State liable for post notes and bills of the denomination of one, two, and three dollars of the Bank of Tennessee increases the volume of indebtedness of the State at least $350,000; and

Whereas the extraordinary appropriations by the General Assembly at its regular session in aid of the charitable institutions of the State to the amount of $228,000, rendered necessary in the opinion of this General Assembly by the urgent needs of the unfortunate insane of the State; and

Whereas the Supreme Court of the United States has recently decided that the railroads of the State are not liable for the State bonds issued in aid of the railroads, thus unlocking from litigation from $12,000,000 to $15,000,000 of said bonds, and which may reasonably be expected to be funded in a short time; and

Whereas the large and unexpected demands upon the State may exhaust the funds of the treasury and cause a default in the payment of interest coupons on the bonds funded and which may be funded under the State debt set-

tlement or funding act of 1883, hereinbefore referred to, unless provision is made therefor, and it being impossible now, for want of time, to levy and collect or collect taxes to meet the demands for the payment of interest coupons falling due July 1, 1885, on bonds already funded under said act and interest due January 1, 1884, July 1, 1884, January 1, 1885, and July 1, 1885, on bonds not yet funded; and

Whereas it is believed that the levy of thirty cents on the one hundred dollars for State purposes will, when collected, be ample to meet the said interest and to repay the moneys authorized to be borrowed for said purposes by this act, therefore—

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the funding board created under the act of the General Assembly to fund and settle the State debt, passed March 15, 1883, being chapter 84 of said acts of 1883, be, and is hereby, authorized and empowered to borrow such sum or sums of money in the name of the State as said board may deem necessary to supplement the funds in the State treasury for the purpose of promptly paying the interest due and to fall due upon the bonds funded under the said act of 1883, and those which may hereafter be funded under said act falling due July 1, 1885, and January 1, 1886; said money, when so borrowed, to be specially set apart for the payment of said interest coupons herein designated, and for no other purpose.

SEC. 2. *Be it further enacted*, That the said funding board shall, for all sums borrowed under the provisions of this act, execute the note or notes of the State, payable to the lender two years from date, and may bear interest not exceeding the legal rate, and shall be approved and signed by the Governor: *Provided, however*, That the State shall, through the funding board, have the right and privilege to redeem and pay off said note or notes at its pleasure before the maturity of same out of any funds in the treasury not otherwise appropriated.

SEC. 3. *Be it further enacted*, That section 223 of Milliken & Vertrees' Code, and all laws and parts of laws or parts of laws in conflict with the provisions of this act, be, and the same are hereby, repealed, and this act take effect from and after its passage, the public welfare requiring it.

Passed June 9th, 1885.

EXHIBIT B.

Acts 1883, chapter 104, page 100.

SECTION 1. That after the chancery court at Nashville shall have divided the assets belonging to the Bank of Tennessee *pro rata* among the holders of the notes of the bank, who shall file their notes before distribution, taking from said note holders an amount of said bank notes equal to their *pro rata*, and the clerk and master shall have returned said notes so taken up into the treasury of the State to be cancelled, the Governor, treasurer, and comptroller be, and they are hereby, directed to prepare certificates of indebtedness to the amount in all of $1,000,000, and in denominations of $1, $5, and $20, as may be found most convenient for the purposes herein expressed. They shall be engraved and printed or lithographed on suitable paper, with appropriate device, be signed by the Governor, comptroller, and treasurer, and payable to the person to whom issued or bearer, and shall bear date the day of their issuance, and shall be payable one-fifth each year for a period of five years, and they shall show upon their face that they were issued under this act in substitution of the notes of the Bank of Tennessee and that they are receivable for taxes and other dues to the State, as by this act provided. They shall be numbered and shall not bear interest

SEC. 2. *Provided, however, always*, That fractional currency, notes of a less denomination than $5, and the $500 and $1,000 notes, known as post notes, shall not be exchangeable under this act. They shall not be received, neither shall any certificates of indebtedness be issued therefor.

SEC. 3. That said certificates of indebtedness shall be receivable at any time, before or after due, in payment of all final judgments now outstanding and subsisting against defaulting or delinquent revenue collectors or their securities, and decrees in favor of the State and in payment of all back taxes which became payable before the year A. D. 1882, and also in payment of all the taxes and all other dues to the State from any tax-payer when such warrants or certificates may be due.

Supreme Court of the United States,

OCTOBER TERM, 1885.

P. P. PICKARD, COMPTROLLER OF THE TREASURY,
vs.
THE PULLMAN SOUTHERN CAR COMPANY,
No. 933.

AND

(Consolidated.)

THE STATE OF TENNESSEE, APPELLANT,
vs.
THE PULLMAN SOUTHERN CAR COMPANY.
No. 936.

THE VALIDITY OF THE ACT IMPOSING A PRIVILEGE UPON SLEEPING CARS.

BRIEF AND ARGUMENT FOR THE STATE OF TENNESSEE.

S. A. CHAMPION,
JAS. M. HEAD,
Attorneys for the State.

MARSHALL & BRUCE, NASHVILLE.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1885.

NO. 933.

P. P. PICKARD, COMPTROLLER OF THE STATE OF TENNESSEE,

vs.

THE PULLMAN SOUTHERN CAR CO.,

AND

NO. 936.

THE STATE OF TENNESSEE

vs.

THE PULLMAN SOUTHERN CAR CO.

(CONSOLIDATED.)

STATEMENT.

On the 16th of March, 1877, the General Assembly of the State of Tennessee passed an act, entitled "An act regulating the mode and manner of valuing property of telegraph companies for taxation, and of taxing sleeping cars," the 6th section of which provides as follows: "That the running and using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroad companies upon which they are run or used, is a privilege, and the companies owning and running or using said cars or coaches are required to report on or before the 1st of May each year to the Comptroller the number of cars so used by them in this State, and they shall be required to pay to the Comptroller by the 1st of July following, fifty dollars for each and every one of said cars or coaches so used and so run over said roads; and if the said privilege tax herein assessed be not paid as aforesaid, the Comptroller shall enforce the collection of same by distress warrant."

In pursuance of the statute herein referred to, the Pullman Southern Car Company, on the 22d of February, 1878, filed in the office of the Comptroller a report showing that "thirty-eight cars were *required* and assigned to various railroad companies in Tennessee," but failed to state the number of cars *actually used*, according to the terms of the act under which the report was made. A copy of this report may be found in the record.

The Comptroller asserted the right, under said act of the Legislature, to collect the privilege tax thus assessed for the year 1877, and the company paid a part of the amount due, under protest, and brought suit to recover the money back, to the end that the validity of the act imposing the privilege tax might be tested, and an agreed state of facts was entered into between the Comptroller and the company, and the cause heard by Chancellor W. F. Cooper at Nashville, Tennessee, and, after thorough investigation of the case, the court held the company liable, and declared the act constitutional. The cause was then appealed to the Supreme Court of Tennessee, where the judgment of the court below was affirmed by a unanimous court, but no written opinion was delivered. The taxes for 1877 were accordingly paid upon thirty-eight cars, as required by the judgment of the court in that case. The opinion delivered by the Chancellor may be found in Third Tennessee Chancery Reports, 587.

The company refused to make any other report or to pay the privilege due for other years, and the Comptroller assessed thirty-eight cars for 1878, 1879 and 1880 and took steps to collect the amount due, which was paid under protest, and suit brought in the United States Circuit Court at Nashville to recover the money back. But one report has ever been made by the agents of the company, although said act required that a report of the number of cars used or run should be made each year, and the present Comptroller has frequently requested a compliance with the law, by making said reports and the payment of the taxes due, but nothing has been paid since 1880.

The Revenue Act of 1881, passed by the General Assembly of Tennessee, provided, among other things, that "Sleeping car companies shall pay an annual tax for each coach of $75." As the company had refused to pay any part of the taxes due for 1881 and 1882, a bill was filed by the State to enforce the collection on the 14th day of December, 1883, in the Chancery Court at Nashville, Tenn., which was removed, upon the application of the defendant, to the United States Circuit Court for the Middle District of Tennessee. The suit which had been previously brought by the company against the Comptroller to re-

cover back the moneys paid in for 1878, 1879 and 1880, entitled "Southern Pullman Car Company *vs.* James N. Nolan," was still pending in the United States Circuit Court, and by consent of parties both causes were heard together, with the stipulation and agreement that if the company should be held liable, a reference might be had to the clerk to ascertain the amount due, and to take any required proof for that purpose. The decision below in both of these cases was adverse to the State, the court holding that the act of the Tennessee Legislature imposing the privilege tax is invalid, because repugnant to the Constitution of the United States, which declares that "Congress shall have power to regulate commerce with foreign countries and among the several States." This conclusion of the court and the judgment bassd thereon are assigned as error, and to which exceptions were taken, and a writ of error prosecuted in the one case and an appeal prayed and obtained in the other.

ASSIGNMENT OF ERRORS.

The decree annulling this act of the Tennessee Legislature is erroneous, because:

First. The business upon which the privilege tax was imposed is not such inter-state commerce as was contemplated by the Constitution of the United States.

Second. The burden thus imposed was placed upon the instruments of commerce, and not upon commerce itself, and in its operations could in no event interfere with the free transportation among the States.

Third. Because the Supreme Court of the State had held said act constitutional, and the decision was not unreasonable, violative of any fundamental law or well-established principle, and the court below should have been governed by the construction given by the Supreme Court of the State under such circumstances.

Fourth. Because the court should have held said act of the Tennessee Legislature constitutional and dismissedthe bill filed by the company against the Comptroller, and sustained the prayer of the bill filed by the State of Tennessee.

Fifth. Because under the Constitution and laws of Tennessee, when a business or occupation is declared to be a privilege, and a license required, the payment of the amount so assessed is not a condition precedent, but simply a tax upon the business.

BRIEF.

It is insisted for the complainant:

First. That the report made by the company does not comply with the law, which requires that the number of cars "actually run or used" shall be given, whereas the report only undertakes to show the number "*required*."

Act Legislature 1877, Sec. 6.

See "Exhibit A" Transcript, p. 3.

Second. That from 1880 to 1882, inclusive, at least sixty cars were in use, and the payment of the privilege tax upon thirty-eight cars only would not estop the State from now insisting upon a full report and the payment of the balance due, as the company failed and refused to comply with the law, and could not now take advantage of its own wrong.

See Record, p. 2.

Third. That all State questions have been eliminated by the decision in the case of Pullman Southern Car Company *vs.* James L. Gaines, Comptroller (3d Tenn. Chancery Reports, p. 587), and the only contentions now before this court are contained in the Federal questions involved.

Stone *vs.* Wisconsin, 94 U. S., 183.

Fairfield *vs.* County of Gallatin, 100 U. S.. 52.

Burgess *vs.* Seiligman, 107 U. S., 34.

Railroad Company *vs.* Gaines, 97 U. S., 709.

Fourth. The fact that certain parts of the attachments of the sleeping cars are patented can in no way interfere with the right of the Legislature to levy a privilege tax upon the "running and using" of sleeping cars over the railroads in this State owned by foreign corporations and run for the accommodation of passengers into, out of or through the State.

Fifth. The contract between the Pullman Southern Car Company and the various railroad companies exhibited in the record, shows that the arrangement intended to be made with the railroad companies was to secure the privilege of running and

using sleeping cars or coaches over the lines of the various railroads, and is not a contract of hiring or leasing cars by the railroad companies, from which it appears that the business is done by the defendants and not by the railroad companies. See copy of contract in Appendix.

Sixth. That the running and using of cars for sleeping purposes only, not owned by the railroads upon which they are run or used, is not such inter-state commerce, the regulation of which is placed by the Constitution of the United States under the control of Congress, nor does the regulation of this occupation, such as is imposed by the privilege tax in question, interfere with transportation or commerce among the States.

Sinnot *vs.* Davenport, 22 How., 227.
Gibbons *vs.* Ogden, 9 Wheat., 210–14.
Foster *vs.* Davenport, 22 How., 224.
Crandall *vs.* Nevada, 6 Wal., 35.
Osborne *vs.* Mobile, 16 Wal., 281.
Tax on Railway Gross Receipts, 15 Wal., 284.
Wiggins Ferry Company *vs.* East St. Louis, 107 U. S., 365.
Moran *vs.* New Orleans, 112 U. S., 69.
Pullman Southern Car Co., *vs.* Gaines, 3 Tenn. Ch., 587.
Dun *vs.* Cullen, 13 Lea, 202.
Lightburn *vs.* Taxing District, 4 Lea, 219.

Seventh. A tax laid upon the instruments of commerce is not a tax upon commerce itself.

See authorities above cited.

Eighth. It is a well-settled rule, long adhered to by this court, that aconstruction given by State courts of last resort to legislative enactments and provisions of State constitutions ought, as a rule, to be followed in the Federal courts; and while this court is not necessarily governed by previous decisions of said courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property, yet unless the decision in question is held to be unreasonable, violative of some fundamental law or well-established principle, this court will be governed by the construction given by the Supreme Court of the State.

Railroad Co. *vs.* Gaines, 97 U. S., 709.
Stone *vs.* Wisconsin, 94 U. S., 183.

ARGUMENT.

Assuming, then, that the Federal questions only are to be considered in the investigation of this cause, the real issue is, whether the laying of a privilege tax upon the occupation of running or using coaches for sleeping purposes passing into, out of or through Tennessee, is such an interference with the commerce among the States that it becomes repugnant to the Constitution of the United States. Whether, indeed, such an occupation is commerce, the regulation of which the Constitution gave to Congress, and whether such a business falls within the meaning of that class of commerce. Commerce, in the common and general acceptation of that term, means a buying or trading together, an interchange of commodities between people of the same or different nations. That this interchange should be uniform throughout the whole nation, and conducted upon principles of equity with foreign nations, were the prime ends sought to be attained by the framers of the Constitution in giving this grant of power to Congress, and in the exercise of the power thus granted Congress has declared that commerce among the several States shall be free—that is to say, citizens of all the States shall be free in their intercourse and interchange of commodities with each other and whatever pertains to that commercial relation, but the regulation and control of the instruments by which this interchange is carried on was certainly reserved to the respective States. For an example: Any of the States of the Union may grant to an incorporated company the right to build and use a railroad, but this grant cannot extend beyond the limits of the State, so that in extending the corporation the permission of the adjoining State through which it is expected to run must first be obtained, and Congress has not the power, without the consent of the State or of the people through whose property the lines of the corporation are to run, to grant such authority; but after the license to construct and use the road has been granted continuously through several States, that highway becomes free to all alike without restriction on the part of the State; but the instruments of commerce and commerce itself are widely different. The corporation thus licensed to do business from State to State cannot grant to another corporation the right to do a different business over its lines unless

the license of the State is first obtained; hence the act imposing the tax in question was restricted to the running and using of sleeping cars and coaches on railroads in Tennessee not owned by the railroads upon which they are run or used. Railroad companies themselves may furnish such accommodation to their customers as they may choose, and may charge additional compensation therefor, under their original grant of authority, but they cannot delegate this authority to another corporation except by a sale or lease of the whole grant. In the case at bar the defendant comes into the State without leave or license and engages in business which the State has declared to be a privilege, and not to be engaged in by her own or other citizens without license first had. And when a compliance with these terms is required we are met with the objection that the defendant is engaged in inter-state commerce; that the business of hauling sleeping berths for the accommodation of the railroad passengers is commerce among the States, because, forsooth, while asleep they are carried from one State to another. No passenger can obtain permission to travel on these sleeping cars without first securing a pass or ticket from the railroad company as a condition precedent.

The building and using of a railroad is not inter-state commerce, but is merely an aid to commerce and one of the instruments by which it is carried on, and is now regarded as an indispensable adjunct. If the railroads themselves are only engaged in aiding commerce, what attitude does a sleeping car company occupy whose business it is not to transport passengers, but to take passengers being transported by the railroad companies and add to their comfort while in transitu? The time was, less than a quarter of a century since, when sleeping cars were unknown, and to-day they are not an essential adjunct to the transportation of passengers from point to point, for it is a fact that we might assume without proof that but a small portion of the passengers even traveling from State to State and remaining on the trains during the night avail themselves of these accommodations; hence the transportation of passengers and commerce in that regard is wholly independent of the business carried on by the sleeping car companies.

Chief Justice Chase said, in delivering the opinion of the

court in Oborne *vs.* Mobile, 16 Wallace, 481: "It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal Government in their integrity," and said further: "The whole court agree that a tax on business carried on within the State and without discrimination between its citizens and citizens of other States might be constitutionally imposed and collected." If it is within the legislative power of the State to levy a tax upon the occupation or business of running cars for sleeping purposes, which belong to a foreign corporation, certainly this right should be asserted, and it is immaterial whether it is done in the form of a privilege tax or otherwise so long as it does not affect commerce between the States. It is one of the cardinal principles of our Government, agreed to by all parties, that the tax or tariff levied for governmental purposes should bear heavily upon the luxuries and lightly upon the necessaries of life; and certainly the use of a sleeping car, while we have come to think it essential, is a luxury, not an absolute necessity, and the laying of a privilege tax upon the use of such cars does not do violence to the Constitution. Certainly they should contribute something to the support of the States through whose territory they run and by whose laws they are protected while within the jurisdiction of the respective States. It was said in "State Tax on Gross Railway Receipts," 15 Wallace, 284, that "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution, although the ultimate effect may be to increase the cost of transportation." As we understand it, this court has always adhered to the doctrine that a State may lay a tax upon the instruments of commerce or upon the owners of public highways, but not directly upon commerce itself. This was the distinction made in the two cases reported in 15 Wallace. In the one case a tax was laid upon the freight being transported, and that was held to be unconstitutional. In the other case it was laid upon the gross receipts, which was a tax upon the owner, and while its tendency was to affect commerce, still the court held it competent for a State Legislature to pass such an act, the results in both cases perhaps being the same. But is it not equally clear that it is within the power of a State Legislature to levy a tax in the form of a privilege upon

the cars, or stage-coach, or other instrument, or upon the use of instruments in a particular way, even when the effect is to increase the cost of transportation, and in that way disturb and interfere with commerce? Justice Strong said, in delivering the opinion of the court in "State Tax on Railway Gross Receipts:" "Very manifestly it is a tax upon the railway company, measured in amount by the extent of its business or the degree to which its franchise is exercised. That its ultimate effect must be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property that may become a subject of commerce or any instrument of commerce affects commerce itself. If the tax be upon the instrument, such as a stage-coach, railway car, or canal or steamboat, its tendency is to increase the cost of transportation; still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid." 15 Wallace, 294. In this case the Legislature of Pennsylvania had levied a tax of three-fourths of one per cent. upon the gross earnings of all railway companies in the State, to be paid not by the shipper, but by the owner of the railroads. In the case of the "State Freight Tax," decided at the same term of the court, 15 Wallace, 232, a graded tax was laid by the commonwealth of Pennsylvania on each two thousand pounds of freight transported. This court held the tax so laid to be repugnant to the inter-state commerce clause of the Constitution, because the tax was laid upon the freight itself and not upon the instruments of commerce, nor upon the receipts or right to use cars for a given purpose; and while the tax was not paid directly by the shipper, but by the railroad company, this was only a form or means of collection, and the burden rested and was intended to be laid at last upon the articles of commerce, and really to be paid by the shipper. In the case at bar the tax was levied upon the right to run and use cars in this State for a particular purpose, not for ordinary transportation, but for sleeping purposes, and the use of the cars in this way was declared by the Legislature to be a privilege. The tax, however, was not measured by the number of passengers transported, but by the number of cars used for that purpose, the extent to which the franchise was exercised. The ultimate effect may be to increase the cost of sleeping berths and

amount in substance to a tax upon passengers, but by the act of the Tennessee Legislature the tax would be payable if the cars were run through the State for the purpose indicated, whether any berths were sold or not, and the cost of the privilege would not be increased if each car was crowded at all times to its fullest capacity. If a tax of a given amount had been fixed by the Legislature upon each 100 passengers carried by the company, this would be in violation of the Constitution, even though it was paid by the Pullman Car Company. That would be a tax upon the subjects of commerce, and the form of collection resorted to would not change its legal effect.

It is a principle of law well settled, that the Legislature may tax whenever it has jurisdiction of the person, property or business, Conceding for the purposes of this argument, that the Pullman Southern Car Company is domiciled in the State of Kentucky, then it follows that Tennessee has no jurisdiction of the person, and can make no levy on this account, but as to the property of the company, two cars domiciled in the State and running between Nashville and Memphis, the State would have the right to tax them upon their value or upon the business in which they are engaged, or both. This could not be seriously controverted. But the State makes no effort to tax these two or any other cars belonging to the company upon their value, but declares the business of running and using sleeping cars or coaches for sleeping purposes a privilege, unless the cars are owned by the companies over whose roads they are run, and claims a contribution from the business on all cars so engaged in the State, whether domiciled or not. If the Pullman Southern Car Company is a non-resident of the State, has no office in the State, no agents in the State, has no property in the State, sells no tickets in the State and receive and discharge no passengers in the State; in other words, no business is done by the company in the State which claims the protection and benefit of her laws, then no tax can be imposed upon its business carried on entirely out of the State. But in this case the tax so levied becomes a debt, and it is not necessary to interfere with the cars running from State to State to secure its payment, even by distress warrant, for the cars that have at all times

had a situs in Tennessee, are of ample value to pay the tax. Under the comity existing between the States under the provisions of the Federal Constitution, the defendant would have the right to run its cars into or through the State, and if it did no business, free from taxation. But whenever it engages in the business within the State, which has been declared by the sovereign authority to be a privilege, it is bound to obtain the license for the purpose of taxation as a resident of the State, by reason of the business done within her limits, not according to the amount of business done, but so much for each car used in the business, whether it does much or little. This was precisely the means adopted by the city of Mobile to tax the Southern Express Company, incorporated by the State of Georgia, but doing business within that city. In this case the corporation taxed was a non-resident of the city and State, but did business within its limits. The tax was a fixed sum imposed upon the business. It was conceded that the transportation of packages was from one State to another, and thus far the parties were engaged in commerce among the States. It was held that the tax was not levied upon the commerce, but upon the business, and therefore subject to taxation. See Osborn *vs.* Mobile, 16 Wallace, p 481. This distinction is also fully recognized in Telegraph Company *vs.* Texas, 105 United States, p. 454. The court said: "The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision of Congress, occupies in Texas the position of an instrument of foreign and inter-state commerce, and have become agents for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on its occupation and business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State or sent by public officers on business of the United States." But the court held that the specific tax on each message sent out of the State was inter-state commerce, so if the tax in the case at bar had been laid upon each passenger carried into, out of or through the State, it could not be sustained. In Wiggins Ferry Company *vs.* East St. Louis, 107 United States, p. 376, Justice

Wood delivering the opinion, said: "The license fee exacted is, in fact, levied upon the business of keeping a ferry, for it is not laid upon all boats owned by the ferry keeper, but upon those plying between the two banks of the river, and is graduated by the number of boats used by him. If the same license had been exacted against the keeper of a ferry across a navigable stream in the State of Illinois, the Chicago river, for instance, it would scarcely be contended that it fell within the constitutional provision, and the fact that in this case the ferry crosses a river which divides two States, cannot change the nature of the exaction." So in the case at bar, the license fee exacted is laid upon the business of using cars for sleeping purposes, and it can make no difference that the cars being so used cross lines dividing two States. In that case a tax was placed directly upon the boats licensed by the laws of the United States to do business upon a navigable river from one city to another. The Wiggins Ferry Company had one of its landings in the State of Illinois, the other was located in the State of Missouri; part of its machinery was in Missouri, in the city of St. Louis, the balance in East St. Louis, in the State of Illinois.

It was insisted in the court below that if the Legislature had the power to levy a privilege tax, this power might be so abused as to prohibit the defendant altogether from coming into the State, and we concede this could be true, but this would be no reason against the existence of the power. Justice Woods answers this explicitly in Wiggins Ferry Company *vs.* East St Louis, 107 United States, pp. 376-7. The court said: "The counsel for plaintiff in error contend that if the power of the city of East St. Louis to exact a license fee of $100 from every ferry boat is conceded, the city could double or treble the fee at will. It is sufficient to say in reply to this that it does not follow from the fact that a power is liable to abuse that it does not exist. If the power is abused, the remedy is with the Legislature."

It will be observed that in all of the cases, or nearly all, where the States have imposed a privilege tax upon commerce of any kind, or upon the instruments of commerce, where the laws have been declared unconstitutional because in conflict with the laws of the United States, that there has been a license

granted by Congress and a fee paid for the exercise of the privilege. In the case of Sinnot *vs.* Davenport, 22 Howard, p. 227, the court decided that an act of the Alabama Legislature was in conflict with the act of Congress which prescribed that all vessels engaged in the coasting trade should be enrolled and pay a license, but the act of the Legislature required the vessels navigating the waters of the State, before leaving the port of Mobile, to file a statement in the office of the Probate Judge of the county, giving the name of the vessel, place of residence and the interest of each owner in the vessel, and annexed a penalty for the non-compliance. Justice Nelson, in delivering the opinion of the court, said: "When, therefore, an act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this without regard to the sources of power whence the Legislature derives its enactments." But the act of the Legislature was declared void because it required a condition precedent which was in conflict with the act of Congress regulating the coasting trade. The same Judge said, in Gibbons *vs.* Ogden, 9 Wheaton, pp. 210–214: "These are the guards and restraints, and the only guards and restraints which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade, and upon the compliance with which, as we have seen, as full and complete authority is conferred by the license to carry on the trade as Congress is capable of conferring." But a license had been granted in that case, and the law of Alabama imposed another condition to the privilege. The court said, in Moran *vs.* New Orleans, referring to that case: "The act of the Legislature of Alabama in that case was declared void on the single and distinct ground that it imposed another and additional condition to the privilege of carrying on this trade within her waters." The same principle was decided in Foster *vs.* Davenport, 22 Howard, p. 244, the decisions in all these cases being placed upon the distinct ground that the vessels had been duly enrolled under the act of Congress and licensed for the purpose of carrying on the coastwise trade or other inter-state commerce. But the Pullman Southern Car Company has never paid a license to the United States, nor has Congress undertaken to fix the terms upon which license may be granted to such corporations.

Justice Matthews said, in delivering the opinion in the case of Moran *vs.* New Orleans, 112 United States, p. 74: "That, unrestrained by authority of the Federal Constitution, the taxing power of the States extend to and embraces the persons, property and pursuits of their people, although it is not always easy in particular cases to draw the line which separates the two jurisdictions." In this case the court reviewed all the authorities bearing upon this point. The cause was brought by writ of error to this court. It seems to have been conceded that the vessels had their situs in the city of New Orleans; that the city had the power to pass such an ordinance so far as the same could be given by the laws of the State, there is no controversy; but the conflict arose, not because the vessels were engaged in commerce from points without to points within and from points within to points without the State of Louisiana, but solely upon the ground that these vessels had been licensed by the United States under an act of Congress and the laws of the United States had been complied with, and the city ordinance added another and distinct condition, and provided that if not complied with the owners of the vessels should be enjoined until the taxes claimed by the city were paid; so that an inevitable conflict resulted between the requirements of the city and the conditions imposed by Congress, and the court in delivering the opinion did not place it upon the ground that the vessels had no situs in that State, as it is claimed was the point in the argument in the case of Wiggins Ferry Company *vs.* East St. Louis, but upon the single and distinct point of a conflict between the State and Federal authority. Justice Matthews, in delivering the opinion of the court, said: "It is a charge explicitly made as the price of the privilege of navigating the Mississippi river between New Orleans and the Gulf in the coastwise trade; as a condition on which the State of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress. The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the city thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United

States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him for using his boats in this way, he shall not be permitted to act under and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon the payment of the tax. In such an opposition the only question is, which is the superior authority? and reduced to that, it furnishes its own answer." See Moran *vs.* New Orleans, 112 U. S., p. 75.

In this case, the city of New Orleans was authorized by an act of the Louisiana Legislature to levy, impose and collect license upon all persons pursuing any trade, profession or calling, and provide for the collection, expressly declaring that the license should not be construed to be a tax upon property. The same act also provided that "All license imposed by the city not paid on the 31st of July shall be seizable after thirty days' publication in the official journal, and upon the prayer of the city, through its proper representatives, any court of competent jurisdiction shall enjoin said person or persons so liable to pay a license tax, and who shall refuse or neglect to pay the same, from continuing to carry on such business or profession until he shall have paid the same and all costs and charges for the recovery and enforcement of the claim therefor." The city authorities, in pursuance of this act, passed an ordinance providing that "Every member of a firm or company, every agency, person or corporation owning and running towboats to and from the Gulf of Mexico, five hundred dollars." Cooper was the owner of two steam propellers, enrolled and licensed at the port of New Orleans under the laws of the United States, to be employed in the coasting trade, and they were used chiefly in towing boats to and from the Gulf of Mexico. The city brought suit to recover the amount of the tax under the ordinance, and obtained judgment in the District and Supreme Courts of Louisiana.

If the Congress of the United States had passed laws regulating commerce upon railways and extending its authority to

sleeping car companies, requiring them to comply with certain terms upon which license should be issued, the State could not then require other conditions or the payment of another license, because this would be in conflict with the act of Congress, and, like the cases referred to, would be unconstitutional. But it is not pretended that such is the case here, and until Congress does exercise this power and extend it to such corporations there can be no pretense of a conflict of authority between State and National legislation. If it be conceded that the running and using of cars for sleeping purposes is such commerce between the States as was authorized by the Constitution to be given to Congress, we believe that until this power has been exercised the States are not inhibited from requiring the railroad company to pay a privilege or obtain a license. See Munn *vs.* Illinois, 94 U. S.; People *vs.* R. R. Co., 104 Ill.; Chicago *vs.* Iowa, 94 U. S.; Brown *vs.* State of Maryland, 12 Wheaton, p. 449.

A privilege in Tennessee has been defined to be "the exercise of an occupation or business which requires a license from some proper authority, designated by some general law, and not free to all or any without such license." Jenkins *vs.* Ewing, 8 Heis., p. 456. Our court has also held that "the Legislature may tax privileges in what proportion they choose, provided the inequality be not such as to make it oppressive upon any particular class of the community." Mayor of Columbia *vs.* Beasly, 1 Hum., p. 232. And in a recent case decided by the Supreme Court of Tennessee it was held that the act of the Legislature declaring an occupation or business a privilege, need not contain a positive prohibition against engaging in the business without first taking out the license, the simple imposition or fixing the amount of the tax being a sufficient prohibition. In this case the point was made that the Legislature of 1883 had at the same session passed two acts which were approved by the Governor on the same day; the one entitled "An act to provide more just and equitable laws for the assessment and collection of revenue for State, county, municipal purposes, etc." And the other, "An act to provide revenue for the State of Tennessee and the counties thereof." By the first of these acts it was provided: "That the occupations and business transactions that shall be deemed privileges and be taxed, and not pursued or done without license,

are the following," enumerating a large number, but not including "commercial agencies," the payment of the tax upon which was being resisted. But by the fourth section of the second of the above acts it was provided: "That the rate of taxation on the following privileges shall be as follows per annum:" Among others, "commercial agencies, $100." And the payment of this tax was resisted upon the ground that this occupation had never been declared a privilege nor its pursuit prohibited. But the court held that this was unnecessary, as the second act fixing the amount of the tax was sufficient, thereby announcing the general principle that the levying a privilege tax does not make its payment a condition precedent to engaging in the business declared a privilege, but simply a tax, a debt. Tennessee *vs.* Cullen, 13 Lea, p. 202.

POWER TO IMPOSE A PRIVILEGE TAX UNDER THE CONSTITUTION OF TENNESSEE.

The Constitution of Tennessee, adopted in 1870, provides in Section 28 that "All property, real, personal or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational; and shall except one thousand dollars worth of personal property in the hands of each tax-payer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that that taxes shall be equal and uniform throughout the State. No species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct."

From the above section of the Constitution of Tennessee it will be seen that the Legislature is specially authorized to declare and tax privileges, and the Supreme Court of Tennessee has often decided that it is the peculiar prerogative of the legis-

lative department to declare what shall be a privilege, and this may embrace almost every avocation in life.

"There is a clear distinction recognized," says the Supreme Court of Georgia, in Home Insurance Company *vs.* Augusta, 50 Ga., p. 530, "between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. A license is a right granted by some competent authority to do an act which without such authority would be illegal. A tax is a rate or sum of money assessed upon the person, property, business or occupation of the citizen." This principle has been repeatedly recognized by the Supreme Court of Tennessee, beginning as early as 1839, in Robinson *vs.* Mayor of Franklin, 1 Hum., p. 156.

And in Cooley on Taxation, p. 384, the general rule is laid down that "the government may, in the discretion of its Legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any species of property and tax that only. The same is true of occupations—the government may tax one or it may tax all. There is no restriction upon its power in this regard, unless one is expressly imposed by the Constitution." And in the Constitution of Tennessee the power is expressly conferred upon the Legislature "to tax merchants, peddlers and privileges in such manner as they may from time to time direct." It is, therefore, perfectly manifest, as has been repeatedly decided by the Supreme Court of Tennessee, that the Legislature may declare almost any occupation a privilege and tax it as such, "provided the inequality be not such as to make it oppressive upon a particular class of the community." Jenkins *vs.* Ewing, 8 Heis., p. 456.

The Supreme Court of Tennessee held in the case of Lightburne *et al. vs.* Taxing District, 4 Lea, p. 219: "That it is no regulation of commerce between the States, and not repugnant to the Constitution of the United States, for the Legislature to levy a privilege tax upon an agent who represented common carriers transporting goods from one State to another." In that case Lightburne was agent for the Memphis & Cincinnati Steamboat Packet Company, and the steamers belonging to the com-

pany were engaged in carrying freight and passengers from Memphis, Tenn., to Cincinnati, O., and other points beyond the limits of the State.

Defendant was located in Memphis and engaged in making contracts for the company. He was also agent for the Pennsylvania Central Railroad, a foreign corporation having no terminus in Tennessee, and his business was to make contracts for the transportation of freight and passengers from points within the State to points without the State. This occupation was declared by the Legislature to be a privilege, and a stipulated tax imposed of $25 per annum. The only question presented was whether the act declaring it to be a privilege, and taxing it as such, was a regulation of commerce and a discrimination against public highways not having their termini in Tennessee, as the tax was not imposed except in such cases, and the court held that the act in question was not a violation of the Constitution of the United States.

In that case it was conceded that the Legislature had the power to declare such an occupation a privilege, unless it was an interference with inter-state commerce or violative of the Constitution of the United States in discriminating between citizens or corporations of other States. So there can be no question that the Legislature had the power to declare the running and using of cars in this State for sleeping purposes a privilege, unless the Constitution of the United States is violated in doing so.

It is insisted that as the Act of 1877 does not require railroads owning their sleeping cars to pay a privilege tax, it is a discrimination in favor of citizens or corporations of Tennessee, or the roads owning their own cars.

As we have before shown, the Legislature has the right to tax all property situated within the jurisdiction of the State, irrespective of the residence of its owner, and, in addition, to tax the business or occupation as a privilege, in which the property is engaged. Whether one or both of these taxes shall be assessed is for the Legislature to determine. And, as in this State, the railroad companies owning their sleeping cars are necessarily taxed upon their value, the Legislature saw proper to impose

only the privilege tax upon such companies and cars as did not pay a tax to the State upon their property value. The sleeping car, as such, is no more exempt from taxation than the freight car, and where they are owned by the railroad using them, and have been taxed upon their value, the State did not see proper to impose double taxation upon them in order to reach other sleeping cars which were paying no tax.

EFFECT OF SUBSEQUENT REVENUE ACTS.

It is insisted that the several revenue acts repeal or abrogate all former acts on the subject.

Article 2, Section 17, Constitution of Tennessee, declares, among other things, "That all acts which repeal, revise or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revised or amended."

From 1873 to 1881 there was no general revenue act passed by the Legislature of Tennessee, but former acts were simply modified or amended.

The revenue acts of 1881 and 1883 repeal or modify former laws only by saying: "That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed;" and Section 49, of the Code of Tennessee, which is still in full force, provides that "The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

It is not pretended that the act of 1877 declaring the running or using of sleeping cars in the State to be a privilege, has ever been expressly repealed in the manner pointed out by the Constitution. On the contrary, each revenue act passed since 1877 has expressly recognized this business as a privilege, and has affixed a specific tax for the exercise thereof. And while it is true that the amount of said privilege tax has been different for different years, still the amount claimed by the State for each year has been specific and well defined. From the moment the amount of the privilege tax for a given year is fixed by the Legislature, the obligation upon the part of all parties engaging in

the occupation or business declared to be a privilege, to pay to the State the requisite amount becomes complete. No assessment is necessary or could be made other than to ascertain the extent of the business done, according to which the privilege tax is regulated. When the rate of taxation is fixed, and the amount of the privilege upon a given occupation is prescribed by the Legislature, the contract which every citizen makes when he becomes a member of society, to contribute his just proportion of the public burdens, for the protection that is afforded him is complete, and the State may resort to any means she sees proper to enforce this obligation, leaving it to the citizen to make such defenses as he may be entitled to. The implied repeal of the law by the passage of another act fixing a different rate of taxation, or amount of the privilege tax for a different year, could not repeal the obligation to pay the tax originally imposed, since that had become a vested right in the State. Nor could the payment of a portion of the amount actually due and its receipt by the State's officers relieve the citizen from his obligation to pay the remainder, nor operate as an estoppel against the State when suing in her own name to recover the full amount shown to be due.

So it is manifest that the act of 1877 has not been repealed by the method pointed out by the Constitution, and that the rights created in favor of the State have not been disturbed by subsequent legislation, for they became vested so soon as the act creating them was passed.

THE LEVY OF PRIVILEGE TAX IS A SUFFICIENT ASSESSMENT.

If it were true that in the absence of an assessment the rights created by an act imposing a tax would be destroyed by subsequent legislation on the subject, it would be of no avail to the Southern Pullman Car Company in this case, for the reason that the levy by an act of the Legislature of a privilege tax creates a vested right without a formal assessment, and the State may recover the amount by any common law action, and the remedy pointed out in the statute need not be pursued, for that would be merely cumulative; the remedy by distress warrant need not be pursued by the State. See State *vs.* Duncan, 3 Lea, p. 679; Memphis against Looney, 9 Baxter, p. 180; Childress against Vance, 1 Baxter, p. 406.

In the case of the United States *vs.* The Dollar Savings Bank, 19 Wallace, p. 227, the Supreme Court of the United States held: "That the levy by Congress of a privilege tax was a sufficient assessment, and subsequent acts of Congress changing the rate of taxation did not interfere with the vested right created by the former act, and that an action of debt to recover the privilege taxes may be maintained." So in this case, the levy by the Legislature of a privilege tax upon the running and using of sleeping cars created a debt in favor of the State, and the change of the rate of taxation by acts of the Legislature afterward passed in no way interfered with the right of the Legislature to recover that debt; and this may be done either by distress warrant or any other form of action for the recovery of debts. After the privilege was declared and the rate fixed upon each car, nothing remained to be done in order to find out the entire indebtedness except to ascertain the number of cars run and used for sleeping purposes, and the statute provided that this fact should be made known by a report made to the Comptroller by the company each year. As the Pullman Southern Car Company has refused to comply with this provision of the act, the remedy by distress warrant could not be pursued, and the Comptroller was forced to legal proceedings to ascertain the number of cars and at the same time recover the debt due the State.

S. A. CHAMPION,
JAS. M. HEAD,
Attorneys for the State.

APPENDIX.

THIS INDENTURE MADE THIS NINETEENTH DAY OF JUNE, A. D. 1872, BETWEEN THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE PARTY OF THE FIRST PART, AND THE PULLMAN SOUTHERN CAR COMPANY OF THE SECOND PART.

WHEREAS, The said party of the second part is now engaged in the business of manufacturing railway cars, known as drawing-room cars and sleeping cars, under certain patents belonging to them, and of hiring the same to railroad companies and receiving therefor income and revenue by the sale to passengers of seats, berths and accommodations therein.

AND WHEREAS, The said first party is desirous of availing itself of the use on and over its lines of road of the cars constructed under the sleeping and drawing-room car patents, now the property of said second party, and also of connections by means of said cars with other lines of railroad whereon said cars are now operated by said second party.

1st. NOW THIS CONTRACT WITNESSETH, That the said party of the second part, in consideration of the covenants and agreements of the party of the first part, hereinafter mentioned, to be by them kept and performed, hereby agrees with the said party of the first part that they will furnish drawing-room cars and sleeping cars to be used by said first party for the transportation of passengers, sufficient to meet the requirements of travel on and over their line of railroad, and on and over all lines of railroad which they now control, or may hereafter control, by ownership, lease or otherwise. The said cars so furnished to be satisfactory to the General Superintendent of said first party.

2nd. The said party of the second part hereby agrees that they will keep the carpets, upholstery and bedding of each of the said cars in good order, and repair and renew and improve the same when necessary; at their own expense, excepting repairs

and renewals made necessary by accident or casualty; it being understood that the said first party shall repair all damages to said cars of every kind occasioned by accident or casualty during the continuance of this agreement.

3rd. The said party of the second part hereby agrees, at their own cost and expense, to furnish one or more employes, as may be needful, upon each of said cars, whose duties shall be to collect fares for the accommodations furnished in said cars, and generally to wait upon passengers therein and provide for their comfort.

4th. The said party of the first part hereby agrees that the general officers of said second party and the employes named in Article III. of this agreement shall be entitled to free passage over the lines of the first party when they are on duty for the said second party.

5th. The party of the second part hereby agrees, that the general officers of the party of the first part shall be entitled to free passes in any of the cars furnished by said second party under this agreement.

6th. It is hereby mutually agreed, that the said employes of the second party named in Article III. of this agreement, shall be governed by and subject to the rules and regulations of the said first party, which are or may be adopted from time to time for the government of their own employes, and in the event of any liability arising against said first party for personal injury, death or otherwise of any employe of said second party, it is hereby distinctly understood and agreed, that the said first party shall be liable only to the same extent they would be if the person injured was an employe in fact of said first party and for all liability in excess thereof shall be indemnified and paid by said second party.

7th. The party of the first part, in consideration of the use of the aforesaid cars hereby agrees to haul the same on the passenger trains on their own line of road, and on all roads which they now control, or may hereafter control, by ownership, lease or otherwise, and also on all passenger trains on which they may, by virtue of contracts or running arrangements with other roads, have the right to use such cars, in such manner as will best accommodate pas-

sengers desiring the use of said cars. And the said party of the first part shall, at their own expense, furnish fuel for the cars and material for the lights, shall wash and cleanse said cars, and shall also keep said cars in good running order and repair, including renewals of worn-out parts and all things appertaining to said cars necessary to keep them in first-class condition, except such as are provided for in Article II. of this agreement.

8th. The party of the first part agrees to furnish to said second party, at convenient points, room and conveniences for airing and storing bedding.

9th. The said party of the first part further agrees that the said party of the second part shall be entitled to collect from each and every person occupying said cars such sums for said occupancy as may be usual on competing lines furnishing equal accommodations, and that such rules and regulations shall be mutually agreed upon as will most favor the renting of seats and couches in said cars.

10th. The party of the first part hereby agrees to permit the party of the second part to place their tickets for seats and coaches for sale in such of the railroad ticket offices as may be desired by said second party, and such services shall be performed by, and as part of the general duties of the ticket agents, and without charge to the party of the second part; proceeds of such sales to be at the risk of said second party.

11th. The party of the first part hereby agrees, that said second party shall have the exclusive right, for a term of fifteen years from the date hereof, to furnish for the use of the first party, drawing-room or parlor cars and sleeping cars, including reclining chair cars, on all the passenger trains of said first party, and over their entire line of railroad, and on all roads which they control or may hereafter control, by ownership, lease or otherwise, and also on all passenger trains on which they may, by virtue of contracts or running arrangements with other roads, have the right to use such cars, and that they will not contract with any other parties to run said class of cars on or over said lines of road during said period of fifteen years.

12th. The said second party, for the consideration aforesaid,

hereby guarantees said first party against all damages of whatsoever kind which may be by said first party incurred in consequence of any infringement of patent rights in the construction and use of any of said cars which may be used by said second party upon the lines of said first party under this arrangement, it being the meaning and intent of this article that the said second party shall secure said first party against all manner of expenditures which may be incurred by said party in consequence of any litigation connected with alleged infringements of patent rights for the interior arrangements of said cars, and that they will pay off and discharge all judgments obtained at any time against said first party on account of such infringements.

12th. It is mutually agreed between the parties hereto, that in case either of said parties shall at any time hereafter fail to keep and perform any of the covenants herein contained to be by them respectively kept and performed, then, and in that case, after written notice shall have been given to the defaulting party hereto of the default complained of, if the said defaulting party shall refuse or neglect to make good, keep and perform such unfulfilled covenants and conditions of this agreement within a reasonable time after such notice, the other party shall be at liberty to declare this contract ended, and no longer in force.

In Witness Whereof, the party of the first part hath caused its corporate seal to be attached hereto by the President and Secretary, and the party of the second part hath caused its corporate seal to be attached hereto, in like manner, attested by its President and Secretary.

SEAL.

The day and year first above written.

LOUISVILLE & NASHVILLE RAILROAD CO.

By [Signed] H. D. NEWCOMB,
President.

By [Signed] W. RANNEY,
Secretary.

SEAL.

THE PULLMAN SOUTHERN CAR CO.

By [Signed] GEO. M. PULLMAN,
President.

Attest:
[Signed] S. M. LEMONT,
Secretary.

117-345
JAN 18
JAMES H. McKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1895.

P. P. Pickard, Comptroller of the Treasury,
vs.
The Pullman Southern Car Company.
} No. 255.

AND

(CONSOLIDATED)

The State of Tennessee, Appellant,
vs.
The Pullman Southern Car Company,
} No. 256.

BRIEF AND ARGUMENT FOR DAVIDSON COUNTY.

THOMAS L. DOAK,
For Davidson County.

A. D. VAIL, STEREOTYPER AND PRINTER, NASHVILLE.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1885.

No. 933.

P. P. PICKARD, COMPTROLLER OF THE STATE OF TENNESSEE,

vs.

THE PULLMAN SOUTHERN CAR COMPANY,

—AND—

No. 936,

THE STATE OF TENNESSEE

vs.

THE SOUTHERN PALACE CAR COMPANY.

(CONSOLIDATED.)

The right of taxation is an indispensable attribute of a sovereign State without which it could not have perpetuity. The right to regulate inter State commerce is an attribute of national sovereignty, and its preservation is no less essential to the general welfare of the Union. In considering the question of controversy equal consideration is imperative in order to protect rights so indispensable, both State and Federal. While State sovereignty on the one hand should never be permitted to pass beyond its constitutional orbit; on the other hand, centralization should never be allowed to invade the domain of the States.

Cltation of authority is unnecessary to establish that a State has the right to lay taxes which may incidentally affect inter-State commerce. Almost every tax, in theory at least, may be said to have this effect remotely. That this class of taxes is within the sphere of the States, upon both general and constitutional considerations, cannot be doubted. But the delicate and difficult task is to determine with precision when any given tax, which has a tendency to affect a subject having immunity, is within the purview of the Federal Constitution, incidental, and when direct.

The real controversy in this case then is, as to whether this tax on the Pullman corporation is indirect in substance and not merely in form. If it falls on inter-State commerce at all, it does not fall on it alone. It reaches further. The burthen is on a general business, one branch of which is the transportation of inter-State passengers. This law does not, as those in the cases cited by my opponents, discriminate and select the transportation of passengers or commodities passing from State to State as the peculiar objects of duty. Consequently it falls incidentally on the prohibited subject—inter-State passengers—on account of its being a general burthen on multiform matters. Not only is it not specific, and restrained to the prohibited subject, but it is also not graduated by the number of passengers carried. The tax, therefore, is not regulated, either as to its object or amount, by the passengers transported.

The conduct of the States, when under articles of confederation, gave rise to the clause of the Federal Constitution under consideration. Interpreting the language of the Constitution in the light of history, it does not seem that the point in question is involved in obscurity. The object was to pass persons and freights from one point in this country to another, through intervening States, free of impost or duty or tribute laid by such States. Under the opinion of the Hon. Judge Matthews, it seems Kentucky could demand tribute in this case without infracting the organic law of the land, but Tennessee may not, because of the *situs* of the property not being within her borders, and decisions of this court are cited in the opinion to sustain that theory, and still, according to the corollary deduced by the

Judge, If Kentucky may levy one dollar of tribute she may exact a million, and thus practically put an end to inter-State commerce on the Pullman line.

It is apparent that the Legislature of Tennessee, in the passage of this law, had not the remotest intention of demanding tribute from inter-State passengers. The State Constitution imperatively demands that all taxation shall be equal and uniform. A large proportion of the railways in Tennessee, as shown by the answer of Pullman Company, *own* their sleeping cars; and as may be gathered from their corporate names, they, too, are engaged in inter-State commerce. There is unjust discrimination in favor of these railways, it is alleged in the answer of this corporation, because they are taxed on the *value* of their sleeping cars, while, in this case, an arbitrary sum is fixed as a privilege tax. From the language of the General Assembly of Tennessee, it is obvious that body sought alone to execute the mandate of the State Constitution requiring uniformity and equality in taxation. The preamble to the act declares the mode and manner of taxation in reference to this class of property used by railways not owning it.

Without jurisdiction to cause this character of property to be assessed for taxation according to its value; unwilling that the Louisville & Nashville Railway and Pullman corporation—each of them foreign corporations—should obtain an unfair advantage over home railways who owned and paid taxes on their costly sleepers, the Legislature honestly endeavored to obey the constitutional behest, and under the taxation of the foreign corporations engaged in precisely the same avocation as the resident railways, equal and uniform. In the absence of evidence to the contrary, this honorable Court will not assume that the end sought was not fairly and equitably attained. Equilibrium of taxation was the duty enjoined. The legislative motive was laudable; the end attained was that of "equal and exact justice to all." If any of this tribute incidentally falls on the inter-State passenger in traversing Tennessee, it falls alike on all, for thus they are equalized with those transported over the home railways.

The perfect fairness of the Legislature in the enactment of the law under review; its purpose of attaining equality and uniformity of taxation with reference to all of the railways engaged in transportation in the State; its purpose to subject foreign corporations that were virtually adjuncts or copartners of one of the rival roads of its own railways, so as to make each corporation carry the same weight of taxation in their race for public patronage; its equitable and legal right to exact of a foreign corporation doing business in the State its proper share of the burden of maintaining that government which exteuded to it, alike with its own citizens, the protecting ægis of the law—all plead in behalf of Tennessee, as well as the sisterhood of States, that this high attribute of sovereignty, the taxing power of the State, a prerogative not only imperial in its chaaacter, but an indispensable adjunct to their welfare, shall not be diminished or impaired or lessened from its elevated dignity, even on constitutional considerations, except on the surest grounds that the State has infringed one of the safeguards which the framers of the Federal Constitution have provided for the protection of the citizen. It is admitted that a State cannot tax a foreign corporation on a principle different from that on which she can tax one of her domestic corporations. Nor is this law inimical to the Constitution in that respect, for by its express terms it applies to all railways or other corporations, whether foreign or resident.

"Where an act of the Legislature is susceptible of two constructions, one which will overthrow the act or make it unconstitutional, and the other will suupport the act and give it effect, the latter is to be adopted by the judicial branch of the Government. This principle commends itself with great force to the Federal courts when they are called upon to expound and apply State legislation, especially in cases where the *revenue law* of a State is in question." St. Louis National Bank *vs.* Passin, 4 Dill., 32.

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it be *clearly* so." Munn *vs.* Illinois, 4 Otto, 113.

"If, then, by any fair and reasonable interpretation, when the case is at all doubtful, the law can be reconciled with the Constitution, it ought to be done, and a contrary course pursued only where the incompatibility is so great as to render it extremely difficult to give effect to the former without violating some provision of the latter": 11 Otto, 407, and a long line of Federal decisions.

The Court will pardon these references to this familiar doctrine, but as they constitute, as it were, the mirror that reflects constitutional construction in its true light, it is always proper to keep them before the Court when an act of a Legislature is under arraignment.

I now propose to test this law by a few cases determined:

In State Tax on Railway Gross Receipts, 15 Wallace, 284, 299, Mr. Justice Strong says: "No doubt every tax upon personal property, or upon occupations, business or franchises, affects more or less the subjects and operations of commerce. Yet it is not everything that affects commerce that amounts to a regulations of it, within the meaning of the Constitution. We think also that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises, or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the Constitution. A power to tax to this extent may be essential to the healthy existence of the State governments, and the Federal Constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence. Is, then, the tax imposed, a tax upon freight transported into, or out of, the State, or upon the owner of the freight, for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate

effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personalty, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage coach, a railroad, or a steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid." The opinion, then, refers to a tax levied upon landlords, physicians and upon bankers, and adds that this is no tax upon the tenant, patient, or customers, "though the burden ultimately falls on them." "But when, as in the other case between these parties, a company is made the instrument by the laws to collect the taxes from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged. Such is not this case."

"If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges, to meet the exaction, is the same."

In Railroad *vs.* Maryland, 21 Wall., 456, Mr. Justice Bradley, delivering the opinion of the Court, said, "It may incidentally affect transportation, it is true; but so does every burden or tax imposed on persons or corporations engaged in that business. * * "The State is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers." * * "But whether the power to afford relief from onerous exactions for transportation does or does not exist in the general government, we are bound to sustain the constitutional powers and prerogatives of the States, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences."

In Osborne *vs.* Mobile, 16 Wallace, 479, the opinion of the Court was delivered by its eminent Chief Justice Chase. The

municipal ordinance required express companies doing business within the city of Mobile, and having a business extending beyond the State, to pay an annual license fee of $500, and the State express companies were required to pay a license fee of only $100.

In that case the Southern Express Company, from whom the license was exacted, was a foreign corporation and engaged in inter-State commerce. It may be said the distinction is that Pullman corporation has no agency for the transaction of its business in Tennessee. That will be discussed hereafter.

The Chief Justice re-affirms the time-honored doctrine in regard to the revenue rights of the States in this ringing sentence. "It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal government in their integrity." The opinion says further, "It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the Court has asserted the right of the State to legislate, in the absence of legislation by Congress, upon subjects over which the Constitution has clothed that body with legislative authority," citing these cases: License cases, 5 Howard, 504; Wilson *vs.* Blackbird Creek, 2 Pet., 245; Cooley *vs.* Board of Wardens, 12 Howard, 315. "But it is not necessary, (says the opinion) to resort to the principles maintained in these cases, for the decision of the case now before us."

The case is then determined briefly in this language: "The license tax was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limit of the State, or rather the making of contracts, within the State, for such transportation beyond it. It was with reference to this feature of the business that the tax was, in part, imposed, but it was no more a tax up inter-State commerce, than a general tax on drayage would be, because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State. We think it would be going too far so to narrow the limits of State taxation."

In that case the great disparity in the license fees laid on home express companies and the Southern Express showed conclusively that the license tax was leveled, four-fifths of it, at its inter-State commerce.

It is insisted that the doctrine of this case, which is in accord with Wiggins Ferry Co. *vs.* East St. Louis, controverts the reasoning of Justice Mathews, wherein he places his decision on the ground that the right to tax, as a privilege, carries with it the correlative right to forbid, and therefore concludes that the State might by onerous exactions break down the right of the Pullman corporation to enter the State to carry on inter-State commerce.

In Crandall *vs.* Nevada, 6 Wallace, 35, Mr. Justice Miller delivering the opinion of the Court, it is virtually held that inasmuch as Congress has not legislated and as the tax in that case did not institute any regulation of commerce of a national character, it did not, therefore, violate the clause of the Federal Constitution which is now under review.

That being the case, the only question for discussion remaining is, does the Act of the Tennessee Legislature violate the constitutional right of the free transit of any of the citizens of the United States through the States? Unless the Act infringes this constitutional privilege, it is not inimical to the Federal Constitution.

From that opinion it is clear the following propositions are correct: 1. That the privilege tax imposed by Tennessee Legislature is not a regulation of commerce. 2. That if it can so be considered, it is one of those powers which Tennessee can exercise, until Congress has so legislated as to indicate its intention to exclude State legislation on this subject.

If the law under review is not obnoxious to the commerce clause of the Federal Constitution, still it is insisted that it infracts the constitutional right of the citizen to free transit, as in the Crandall case. In that case, the express language and object of the State law then under review was to subject the passenger to tribute, and it is conceded the act of the Nevada Legislature was clearly unconstitutional. And with all due defer-

ence to the distinguished judge who delivered the opinion of the court in that case, while the decision is undoubtedly correct, its reasoning on the point in issue is not in accord with the doctrine in Wiggins Ferry Company *vs.* St. Louis. That part of the opinion is quoted as authority by Judge Matthews. And it is admitted that the doctrine announced is not without precedent. The opinion reads: "The imposition of a tax of one dollar for passing through a State by stage coach or railroad cannot sensibly affect any function of the government; or deprive a citizen of any valuable right. But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars." If the tax was *legal*, the fact that the tax might become oppressive, does not alter the *right* of the State to demand it. The Federal Constitution has not clothed the Federal Judiciary with power to test the constitutionality of an action of a sovereign State by imputing a dishonest purpose to its law making power, which is under the same high obligation to observe that sacred instrument, as this Honorable Court is to expound it. It is respectfully insisted, that under the guise of judicial construction, the State ought not to be deprived of their most elevated and essential attribute of taxation. Every revenue law on the statutes of Tennessee even incidentally or remotely affecting inter-State commerce; nay, every privilege tax of the State, when tested by such a standard, must succumb to the taint of unconstitutionality.

In our humble judgment, the only proper basis is, that by the act of Nevada the citizen was deprived of a valuable right; it did sensibly affect the functions of the government. It was, in effect, a denial of the unity of the government; an abridgment of a valuable right of the citizen, for he is at home, in a national sense, when he treads the soil or sails the waters of any part of this Union. The act was obnoxious to the charge of unconstitutionality for these reasons, but not in the remotest degree because of the evil consequences that might ensue from a more onerous and oppressive tax. Apply the same reasoning to each of the cases cited by Judge Matthews in his opinion where State taxation has been upheld, and each of these cases would stand reversed by this Honorable Court. In Crandall *vs.* Nevada, the

Justice, it is to be supposed, simply puts the suppositious cases incidentally to illustrate evil consequences that might attend such legislation, but not as erecting that as a standard by which the constitutionality of the Act was to be measured. But Judge Matthews actually makes this the chief corner-stone on which his decision rests. It is frankly admitted that the contention must cease and the State surrender its taxing power, if unconstitutionality is imputable to the law under review, because the State in its rapacious greed for revenue might strike down the barrier of the Federal Constitution and stalk roughshod over the rights of her own and non-resident citizens, and thus throttle their right to travel over this line. If this be sound logic, then the rights of the States to assess any tax on any of their railways that may be engaged in inter-State commerce ought speedily to be ended by an amendment to the Constitution "without reference to previous condition." For so long as States may levy tribute where inter-State corporations have their *situs*, the people are endangered of their rights being enslaved by the States by "ordinances" of onerous taxation.

Notwithstanding the great stress laid by Mr. Justice Matthews on the suppositious theory that the State Legislature might by oppressive taxation forbid the Pullman cars to enter Tennessee, he quotes a decision therein of the Tennessee Supreme Court determining that the Legislature might fix the privilege tax at any sum, but not so as to lead to oppression. That much in comity and justice ought always to be conceded, that no State would be guilty of oppressive taxation, especially, too, in matters affecting not alone non-resident passengers, but alike her own citizens.

A distinguished Federal jurist aptly said: "The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of *ifs* and syllogisms." And the same doctrine is applicable as to the States.

In the case of Wiggins Ferry Co. *vs.* St. Louis,

as in this case, it was urged that if the power "to exact a license fee of $100 for every ferry boat is conceded, the city could double or treble the fee at will." Said the court, "It is

sufficient to say in reply to this, *that it does not follow from the fact that a power is liable to abuse, that it does not exist.* If the power is abused, the remedy is with the Legislature."

The corollary deduced by the Honorable Judge Matthews, is that the power to tax carries with it the correlative right to inhibit altogether. This portion of the opinion is a syllogism, *i.e.*, "The right to attach this condition—the payment of an annual tax for every car—involves the right to attach any others the Legislature may see fit to adopt, and the question of the right to impose this tax as a condition of the exercise of the privilege, resolves itself into the broader question of the right to prohibit it altogether, for that which the Legislature may license it may forbid; indeed it is forbidden until it be licensed. The question thus reduced becomes one, not of the limitation upon the taxing powers of the State, but upon the power to declare the business of the company as carried on, upon and across the territory, a privilege, or to forbid it altogether."

The deduction is unwarranted. How does "the right to attach this condition involve "the right to attach any others the Legislature may see fit to adopt?" For reasons apparent, the Legislature, clothed alone with the constitutional power to tax this corporation or its property, or to assess a privilege tax for its use in the territory of the State, chose the latter. What other conditions could the Legislature "attach?" It exhausted its power when it assessed it as a privilege, just as it would have done had it assessed its tax on the property.

Nor, as aforesaid, does "the question of the right to impose the tax as a condition of the exercise of the privilege resolve itself into the broader question of the right to prohibit it altogether." The reason assigned for this is, because "that which the Legislature may license it may forbid." Because a Legislature may license, it does not follow that it may forbid; else every avocation or business pursuit would be at the mercy of a Legislature. It is a part of the organic law, State and Federal, that the courts shall be open to all, and justice, had without sale, denial or delay, and yet there is a tax on litigation in almost every State, and this tax the courts hold consitutional.

The right of the State to demand that this corporation, for an exclusive right to have its sleeping coaches on a highway that crosses the territory, shall pay tribute and bear a portion of the burdens of the State under which it reaps its portion of the protection of its laws, does not carry with it the right to "attach" any other conditions. True, in one sense, it may be said that the failure of this corporation to comply with this law would render its action "illegal," and in that sense it would be "forbidden."

But this is strained and far-fetched. But it might with equal propriety, be urged by the Louisville & Nashville Railroad Company, that as its franchise, its track, and its stock, it being a Kentucky corporation and traveling through our State, might be *forbidden* because of our tax. This corporation cannot be forbidden by our Legislature. The Legislature has not sought this. It has simply assessed a tax and authorized the issuance of a warrant for its collection.

Under this law it cannot be prohibited. Under the opinion of our Supreme Court, quoted by Judge Matthews, the Legislature is hedged by the restriction that the privilege tax shall not be oppressive. And for this salutary principle no precedent was necessary. So long as this corporation obeys the just laws of our commonwealth, it has the same freedom and rights that are accorded to every other citizen or corporation.

It is the right of every citizen of the United States to traverse the States in person or with his freight, and pay no tribute. This is necessarily so from the very nature of our government, "one from many."

But the non-resident, to enjoy this immunity and privilege, owes obedience to the laws of every State through which he journeys, and it is that obedience to law that insures him the protection of the State. The moment he refuses to bow to the majesty of just laws, that moment he is amenable to its law.

I therefore deny the closing proposition of Judge Matthews, and insist that "the question reduced, as by him treated, becomes

one of a limitation upon the taxing power of the State, and not, as argued, upon the power to declare the business of the company as carried on, upon and across the territory a privilege, or to forbid it altogether."

It was unnecessary for citation, in the opinion of authority, that there can be no statutory restriction upon the part of a State of the right of the citizen of this Union, or his property, to pass through the State without paying tribute for the privilege. Otherwise the States are as foreign governments to each other, instead of being a family of States, constituting one Federal government. But while this is true, it is equally true that no citizen can travel beyond his own State and through others, with his freight and merchandise, exposing them to barter and sale, without incurring in each State a privilege tax for thus carrying on his occupation, and when he meets the excise man, cry out, "I am forbidden the privilege of a citizen to traverse the State." Nor can this corporation, under the guise of a contract with its railway, exercise, unasked of a State, the exclusive privilege of furnishing a hotel on wheels through the State, without complying with the exaction of the law. It uses its property in our State, it reaps therefor its compensation, it enjoys the protection of our laws, and yet demands this extraordinary privilege exempt from taxation, while like a sponge it gathers up the money of our people to be emptied into the lap of its non-resident company.

None of the cases cited as holding adversely to this law, in the opinion, are analagous. In fact, these decisions simply announce the American truism, that this is one country, and there shall be no embargo laid on free travel in the State of the citizen or his merchandise. Whether they travel with or without their freights, they come and go as they list. But when these freights, or these vehicles of the corporation, are used for gain as a business, it is the inherent right of the State to levy its exaction.

It is admitted that the reasoning of Justice Mathews is not without precedent; yet it is submitted with deference that it is a

refinement of logic and a sophistry that cannot be sustained on any just principle of law. If that reasoning forms a proper criterion by which the constitutionality of a legislative act is to be determined, then we have this Court confronted with this dire result to inter-State commerce, that in the class of cases governed by Osborne *vs.* Mobile, and Wiggins Ferry Co. *vs.* St. Louis, where it is insisted by Justice Mathews they are distinguished from this alone by the *situs*, that the States may wreck inter-State commerce unchallenged by this Court. It cannot be that the *situs* enables a State to outrank Congress and defy this Court by a destruction of inter-State commerce wherever the corporation has a home at the fountain head of such commerce.

Free the case of specious argument and measure it by the true constitutional test to ascertain whether it falls below the standard erected by the Constitution. As has been argued, it may incidentally affect inter-State passengers, and yet not be obnoxious to the charge of unconstitutionality. If it does affect passengers, it is only incidentally. Manifestly that is not the object or intent of the Act, directly nor indirectly. Remotely it may, as in case of a license tax on a hotel keeper. It is only in that ratio. If, as formerly, the inter-State passenger, seeking personal comfort, tarried on his journey at a Tennessee hotel, he was subjected to the same character of tribute; while, without tarrying, he enjoys now the same accommodations and pays a like tribute. It is the same principle as if the Pullman entertained him likewise with a restaurant on wheels. Would that privilege tax be un constitutional?

This corporation is assumed to carry on no business in Tennessee except as the representative of the railway, etc., under a contract of "hiring," so-called. I quote the leading positions assumed in its answer:

Page 9 of Answer: "Respondent is not a carrier of passengers. It does not undertake to transport passengers at all. The railroad companies receive all fares paid by passengers for transportation, whether the passengers ride in cars owned by said companies, or in cars hired by said companies from respondent."

Page 8. "The railroad ticket agents sell its tickets for seats and coaches."

Page 11. "It does no business in the State of Tennessee, except that as the representative of the railroad companies it furnishes seats, sleeping car berths and toilet accommodations to the passengers of the railroad companies."

Page 12. "Insists that the Legislature of Tennessee has no power to tax as a privilege the occupation of furnishing sleeping car accommodations to inter-State passengers."

"This was unequal and unjust discrimination in favor of such railroad companies of the State of Tennessee, as *owned* the sleeping cars which were run or used upon their own roads, as was the case of the New Orleans, St. Louis and Chicago Railroad Company, Memphis and Charleston Railroad Company, and the East Tennessee, Virginia and Georgia Railroad Company."

It is a non-descript. The Court is asked to scrutinize its contract to ascertain whether it is not a mere subterfuge to evade taxation. It furnishes its magnificent and costly sleepers to the railway—it is propelled by the engines of the railway. Its tickets are sold at the terminus of the railway in Tennessee, and throughout the State, just as those of the railway are. Its agents for this purpose are the railway agents—without charge. The railway simply keeps the cars in condition. Every dollar received for its tickets goes to the Pullman treasury. It gets the use free of the railway officers and agents, in Tennassee, including its depots. The L. & N. R. R. is incorporated in Kentucky, but has its terminal in Tennessee. By this arrangement the L. & N. is enabled, without a dollar, to equip its road with costly sleepers, to vie successfully with the inter-State railway mentioned in the answer, which own and are taxed on their sleepers.

Thus the L. & N. is exempt from taxation in this respect, while Pullman takes shelter under its protecting wing and pleads the franchise of that road in aid of its claim of exemption on the ground of inter-State commerce. Can this substitution and contract of hiring avail to that end?

The Pullman is incorporated in Kentucky, manufactures its cars in Illinois, and furnishes them generally under its contracts to the various railways in the Union, and if it pays tribute anywhere, its answer fails to disclose the fact. It can be seen that its occupation or business is on a large scale. Under its specious plea can it escape its quota of taxation?

The State has power to impose a privilege tax on all trade or business carried on within its borders, whether by its own citizens or those of other States.

The resident railways, although engaged in inter State commerce, pay their privilege tax, but in another form. Certainly a foreign corporation shall not be permitted to come into the State and transact business therein and pay neither a privilege tax on its business, nor a tax on its property, while the resident must pay both; to have all the advantages of a resident and escape all taxation to which the latter is subject.

This law simply imposes a tax on a particular business, carried on in a particular mode in the State, and the Legislature has done no violence to the organic law.

Suppose a resident furnished these sleepers under this contract to the railway in question. The *situs* would give the right of privilege as well as property tax. And yet the foreign corporation would have immunity, and the State could not execute its own Constitution, demanding equality and uniformity of taxation.

It is insisted that this case is within the principle laid down in Osborne *vs.* Mobile, 16 Wallace, 479, and Wiggins Ferry Co. *vs.* East St. Louis, 107 U. S., 365, and other authorities hereinbefore referred to.

This case is distinguishable from the case of the State Freight Tax, Reading R. R. Co. *vs.* Penn., 15 Wallace, 232. (In that case, however, two members of the Court, Justices Swayne and Davis dissented on the ground that the tax imposed on them was on the business of those required to pay it, and therefore constitutional.) The majority of the Court, Mr. Justice Strong delivering the opinion, held "that the law in question imposed the

tax upon the *freight* carried." "Very plainly it was not intended, nor is it in fact, a tax upon the franchise of the carrying company, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried." In the case at bar the tax is laid on the *business*, not on the passengers.

In the language of the Court in Wiggins Ferry Co. *vs.* East St. Louis, "The license fee exacted is, in effect, laid upon the business of keeping a ferry, for it is not laid upon all boats owned by the ferry keeper, but only on those plying between the two banks of the river, and is graduated by the number of boats used by him.

Though adverted to before, we remark in concluding the argument, that the very names of the other railways evidence the fact that they, too, are engaged in inter-State commerce, and yet they pay tribute on the value of each car.

It was not feasible to assess the Pullman cars others than was done by the Legislature. If the Louisville & Nashville owned these cars they would be subject, just as the other property and franchises, to assessment for taxation. Can it be that this hiring, so-called, sanctifies those sleepers in the eyes of the law, so that a State assessment is a profanation? Will this exalted tribunal hold that this honest effort, and only correct mode of attaining to that uniformity of taxation imperatively demanded by the organic law of the State, which makes the Pullman share its portion of the burden of taxation equally with those companies owning their sleepers, is in violation of the Federal Constitution?

THOMAS L. DODD,
Of Counsel for Davidson County.

The Pullman is incorporated in Kentucky, manufactures its cars in Illinois, and furnishes them generally under its contracts to the various railways in the Union, and if it pays tribute anywhere, its answer fails to disclose the fact. It can be seen that its occupation or business is on a large scale. Under its specious plea can it escape its quota of taxation?

The State has power to impose a privilege tax on all trade or business carried on within its borders, whether by its own citizens or those of other States.

The resident railways, although engaged in inter State commerce, pay their privilege tax, but in another form. Certainly a foreign corporation shall not be permitted to come into the State and transact business therein and pay neither a privilege tax on its business, nor a tax on its property, while the resident must pay both; to have all the advantages of a resident and escape all taxation to which the latter is subject.

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17-944

JAN 20 1886

JAMES H. McKENNEY, CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 986.

THE STATE OF TENNESSEE,
Appellant,

vs.

THE PULLMAN SOUTHERN CAR COMPANY,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

BRIEF FOR DEFENDANT,

BY

O. A. LOCHRANE.

ATLANTA CONSTITUTION JOB PRINT.

IN THE

Supreme Court of the United States.

THE STATE OF TENNESSEE,
Appellant,

vs.

THE PULLMAN SOUTHERN CAR COMPANY,
Appellees.

BRIEF FOR DEFENDANT,

BY

O. A. LOCHRANE.

STATEMENT.

This case comes before the Court on an appeal from the decision of the Circuit Court of the United States, in Tennessee, upon the right of that State to impose a privilege tax upon the Pullman Car Company for furnishing sleeping car accommodations to inter-State passengers.

There are two Pullman cars in the State of Tennessee doing a local business between points in the State, in regard to which no issue is raised by these pleadings.

The Pullman Southern Car Company is a corporation created by the State of Kentucky, having its chief office in that State, for the transaction of its business, the cars, the right to tax which, is the contention here, come into the

State of Tennessee from other States and pass over the railroads of that State by contracts with them, in the transportation of passengers into, through, and out of the State into other States. While in transit within the State of Tennessee, as in other States, the employes on the Pullman cars are subject to the rules and regulations of such railroad companies, and the railroad companies pay taxes to the State on their roads, rolling stock, etc., and also upon the value of their franchises.

The franchise granted by the State to the railroad companies embraces the right to transport passengers. It is, in fact, the occupation and business of the railroad companies to transport passengers and freight.

And it is by contract relations with them that Pullman cars, with passengers from other States, are placed in their trains as a part of their facilities and conveniences to the traveling public, and carried through Tennessee by their locomotives, and for which such passengers pay such railroad companies the usual compensation for their transportation.

The Pullman cars afford a consideration to the railroad companies in increasing their travel, by the connection with other railway systems, and thus inducing a larger amount of patronage on account of the accommodations afforded to them. It may be remembered that Pullman cars pass through sixty-six counties in Tennessee, with an average of one incorporated town for each county, all claiming the right to tax these cars, or at present figures by the present law of Tennessee, an amount of $250 on each car by the State, and by each county and town a like amount, which would, on the sixty-six cars claimed by the record, make a tax on privileges in Tennessee for defendant's cars going through the State of over $45,000 per annum.

THE ACT OF 1877.

The act under discussion imposes a tax of $50 on each car, increased by subsequent act to $75, and since the de-

cision by the Circuit Court of the United States this act has been re-enacted and the taxes increased to $250 on each car running through the State. The decision of Mr. Justice Matthews gives the status of the litigation, so that it will not be necessary to trespass further with a statement of facts.

ARGUMENT.

We concede here, as we did in the court below, that the sleeping car business done by the two cars brought into the State of Tennessee to do a local business in that State between Nashville and Memphis may be taxed as a privilege by the State, and we make no issue on that subject. But we say that cars not brought into the State to do a business within the State, but passing through the State en route from other States and going into other States, engaged in the business of furnishing sleeping car accommodations to inter-State passengers, is not a business transacted within the territory of the State of Tennessee, and no State can tax as a privilege any business connected with inter-State commerce which is not transacted wholly within her territory.

The fundamental doctrine of the right of taxation has been announced by this court in the words: "*The power of taxation by any State is limited to persons, property or business within its jurisdiction.*" Where the jurisdictional authority is vested over the person or subject matter the right of the State to tax is unquestioned, *so long as no provision of the Federal constitution is violated*, but even with physical jurisdiction in the State, the national constitution protects from State interference, among other things, the mint and the mail and the great movements of commerce.

This is the center point of our argument, for there is no tax claimed on the person, it is a foreign corporation, there is none claimed on the property, for it is only passing over the State. The right asserted is in the nature of a proviso found in the twenty-eighth section of the constitution of Tennessee, which, after enumerating what is

taxable, and declaring: "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State," declares "But the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct."

Under this classification with peddlers the Legislature of 1877 has associated the freedom of commercial intercourse.

There is something in the very association that challenges criticism. Merchants bring in their goods to do a business within the State, peddlers carry a pack to do a business there—but the transportation of passengers over the great transcontinental highways of commerce must be dwarfed very low to bring it within the comprehension of such association.

The business of the Pullman Southern Car Company is inter-State commerce, and this is not an occupation which States may declare to be a privilege.

A reference to repeated decisions of the Supreme Court of Tennessee leaves no room to doubt what constitutes a privilege. The decision under appeal groups the cases upon this subject and we quote:

"'The first legislature after the formation of the constitution,' said that court, the Supreme Court of Tennessee, in French *vs.* Baker, 4 Sneed, 193, 'Acted upon the idea that any occupation which was not open to every citizen, but could only be exercised by a license from some constituted authority, was a privilege. And it is presumed this is a correct definition of the term.'

In Mayor of Columbia *vs.* Guest, 3 Head, 414, the keeping of a livery stable was held not to be a privilege, because the Legislature had not so declared it. 'A privilege,' said the Court in Jenkins *vs.* Ewing, 8 Heisk., 456, 'is the exercise of an occupation or business which requires a license from some proper authority designated

by some general law, and not free to all or any, without such license.'

'There is a clear distinction recognized,' says the Supreme Court of Georgia in Home Insurance Co. *vs.* Augusta, 50 Ga., 530, 'between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. A license is a right granted by some competent authority to do an act which without such authority would be illegal. A tax is a rate or sum of money assessed upon the person, property, business or occupation of the citizen.' And this principle, it is said by counsel for the State in argument, has been repeatedly recognized by the Supreme Court of Tennessee, as early as in 1839, in the case of Robinson *vs.* Mayor of Franklin, 1 Humph. And in Mayor of Columbia *vs.* Beasley, 1 Humph., 232, the Court says: 'The Legislature may tax privileges in what proportion they choose, and so may municipal corporations, provided the inequality be not such as to make it oppressive upon a particular class of the community.'

It results, therefore, that in Tennessee the Legislature may declare the right to carry on any business or occupation, to be a privilege, to be purchased from the State upon such conditions only as the law may prescribe, to engage in and pursue which without compliance therewith, is illegal. In the present case, 'the running and using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared to be a privilege.' The condition upon which it may be obtained and exercised is the payment of an annual tax of seventy five dollars for every car so run and used. If that condition is not complied with, such running and using of sleeping cars or coaches is forbidden, and is unlawful. The right to attach this condition involves the right to attach any others the Legislature may see fit to adopt, and the question of the right to impose this tax, as a condition of the exercise of this privilege, resolves itself

into the broader question of the right to prohibit it altogether, for that which the Legislature may license it may forbid; and it is forbidden unless it be licensed.

The question, thus reduced, becomes one, not of the limitations upon the taxing powers of the State, but upon its power to declare the business of this company, as carried on, upon and across its territory, a privilege, or to forbid it altogether. 'Beyond question,' said Mr. Justice Clifford, delivering the opinion of the court in Transportation Company *vs.* Wheeling, 99 U. S., 273–279, 'these authorities show that all subjects over which the sovereign power of a State extends, are objects of taxation, the rule being that the sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, except those means which are employed by Congress to carry into execution the powers given by the people to the Federal government, whose laws made in pursuance of the constitution are supreme.'

And according to the decision in Crandall *vs.* Nevada, 6 Wall., 35, the power of the States, whether exerted in the form of taxation or otherwise, is still further limited, so as not to deny or impair any rights belonging to citizens of the United States, as such, by virtue of the constitution, as in that case, the right of the people to pass and repass into, through and out of any State, without interruption. In that case, Mr. Justice Miller, delivering the opinion of the court, after commenting on the case of McCullough *vs.* Maryland, said, p. 46: 'It will be observed that it was not the extent of the tax in that place which was complained of, but the right to levy any tax of that character. So in the case before us it may be said that a tax of one dollar for passing through the State of Nevada, by stage-coach or railroad, cannot sensibly affect any function of the government, or deprive a citizen of any valuable right. But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And then one or more States covering the only practicable routes of travel from

the East to the West, or from the North to the South, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.'

In the case of the State Freight Tax, 15 Wall, 232–280, it was distinctly declared that the transportation of passengers or merchandise through a State, or from one State to another, was a subject of the exclusive jurisdiction of Congress, and that a State could not directly tax persons or property passing through it or tax them indirectly by levying a tax upon their transportation. And in Almy *vs.* The State of California, 24 Howard 169, as explained in Woodruff *vs.* Pashaw, 8 Wall, 123–138, it was decided that a stamp tax imposed by State authority upon bills of lading for the transportation of gold and silver from any point within the State to any point without the State, 'was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another which is within the rule laid down in Cransha *vs.* Nevada, 6 Wall, 35, and with the authority of Congress to regulate commerce among the States.'

If a tax upon the person or thing carried is a regulation of commerce forbidden to the States, it seems impossible to escape the conclusion, that a tax imposed as the price of the privilege of being carried, is equally such a regulation. It is immaterial whether the privilege granted or withheld, is attributed to the carrier, or to that which he is engaged in carrying. In both cases it is a burden upon the act of transportation, and a tribute levied directly upon commerce itself. In the language of Mr. Justice Strong, delivering the opinion of the court in the case of the State Freight Tax, 15 Wall, 232–281—'Inter State transportation of passengers is beyond the reach of a State legislature.' * * * 'We regard it as established, that no State can impose a tax upon freight transported from State to State, or upon a transporter, because of such transportation.'"

This is the doctrine of the Federal Constitution: "That Congress shall have power to regulate commerce with foreign nations, and among the several States," and this language is the sovereign will that permits no protest or pretence of State interference under any guise however ingenious, or by any form of law however adroitly prepared, to evade, under the name of taxation, the protection of the National Government over the subject of commerce.

"Congress has willed that commerce shall be free," is the language of this court, in 7 Howard, p. 400, and it is not left to the discretion of the States to refuse the right of passage through their territory, or exact a duty for permission to exercise such a privilege."

On no subject have States been so jealous, on none have they been so aggressive as under statutory devices to exact taxes, and we adopt as a part of this argument the language of three of the members of this court on this subject, which expresses the thought with great force and earnestness, when they say: "By no device or reason, by no form of statutory words can a State compel citizens of other States to pay to it a tax contribution, or toll for the privilege of commerce.

And in 8 Wall, 168, pages 182 and 183, the court says: "It is undoubtedly true as stated by counsel, that the power conferred upon Congress includes commerce as well carried on by corporations as commerce carried on by individuals," the distinguished Judge proceeds: "At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company may be named among the many corporations then in existence, which acquired from the extent of their operations, celebrity throughout the commercial world.

"*This state of facts forbids the supposition that it was intended, in the grant of power to Congress, to exclude from its*

control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations."

In commenting on this subject, in a case involving the question of taxation on earnings on Pullman cars, Judge Gresham, speaking of the constitutional provision, says:

"*This provision was intended to secure the absolute freedom of inter-state commerce and communication from all State restrictions, exactions and burdens.* By it a State is *forbidden* to impose any tax upon freight or passengers *in transitu* from *State* to *State*, or upon the carrier, for the right or privilege of engaging in such business. The transportation of *merchandise* and *passengers* from *State* to *State* is *inter-state commerce*, and the thing which the States are *forbidden* is the *regulation of commerce*. It is *idle to say* that the right to carry passengers from State to State is secured by the commercial clause of the Federal Constitution, from State exactions, if a State may declare by its Legislature, that this right shall not be exercised within its limits unless its consent is first had and paid for. Indiana by its statute, exacts the tax of foreign companies only, and they are prohibited from carrying on their business within the State if they fail or refuse to pay the tax. Why this discrimination against foreign companies, unless it was intended that they should pay for the privilege of transporting passengers through the State? A State can regulate its internal commerce as it pleases, *but no State can exclude from its limits corporations of other States as carriers of passengers from State to State*, nor can any State *charge corporations*, whether organized by its own laws or the laws of other States, *for the privilege of engaging in commerce within its limits*. If Indiana may exact two per cent. of the gross earnings of corporations organized under the laws of other States, as a condition upon which they will be permitted to pass over its territory as carriers of passengers, of course it may exact

more, and other States may make similar exactions. ***The right asserted in this case amounts to a restraint or regulation of commerce between the States***, and its enforcement would render the protection of the Federal Constitution unreal."

The apprehension expressed by the courts on this subject is indeed a broad question, which already in the State of Tennessee, has by its recent action, become prohibitory, by raising the tax to $250.

The State of Tennessee occupies an important position in the geography of the States. Railway systems cross her territory, freight pours over it into the Southern plantations from the granaries of the West. Invalids cross it seeking the sunshine, and to exact a toll for the privilege of carrying freight and passengers across it, illustrates the wisdom of the Federal provision protecting commerce from the caprice and power of the States.

The right to tax by the States person, property or business within its jurisdiction, is conceded, and the right to tax such business done wholly within her territory, is conceded, for such taxation does not affect the people of other States, and if the state should impose burdens on her own citizens, the electricity of public opinion would gather, and from press and fireside soon reach the General Assembly through the ballot-box. But when prohibitory taxes shut out foreign corporations or citizens from furnishing the accommodations to through travel, in lines of inter-State commerce, the people of other States are not only affected thereby, but there is no remedy except the judiciary, and I may add with truth the Federal judiciary, and when every little town and county claims the right to fetter commercial intercourse, and points where the train only stops for a few moments, can impose taxes, and by some petty officer, clothed with brief authority, levy on a Pullman car in the night, and turn men, women and children out of bed *en route* for other States, to hold the property for a privilege tax, we have descended to the last analysis of States rights.

And when towns, or counties, or States can do this, then may ships floating down the Tennessee river be seized and tied to a stake on the banks of some county imposing tax, and the great power of steam succumb to the greater power of a Constable.

The business of the Pullman Company is an entirety. It is the result of its operations in continuous lines over several States; their business from Chicago to Florida is but one business; it is not conducted through branch agencies or officials in separate and detached parts, it is as continuous as that of a ship floating over the waves to its destination at distant ports. It has no similarity to the cases commented on.

The decision of the Court under review says:

"The case is to be distinguished from that of Osborn *vs.* Mobile, 16 Wall. 479, where the subject of the tax was not the act of transportation itself, but a general business carried on within the State by a resident citizen thereof, which included the making of contracts for transportation beyond the limits of the State.

Nor is it within the decision in the case of Wiggins Ferry Co. *vs.* East St. Louis, 107 U. S., 365, where the point ruled was that the levying of a tax upon vessels or other water craft or the exaction of a license fee by the State within which the property subject to the exaction has its *situs* is not a regulation of commerce within the meaning of the constitution of the United States, although the property is employed in foreign or inter-state commerce.

In the present case the Pullman Southern Car Company, a corporation of Kentucky, has no domicil in Tennessee, and is not personally subject to its jurisdiction for purposes of taxation; and the sleeping cars which it runs and uses upon the railroads of that State, in the transportation of passengers into and from it, from and to other States, has no *situs* within that State for purposes of taxation. They are not brought into the State for the purpose of being

DISCRIMINATION.

This law is subject to other objection; it purports to be a tax on privileges, while by the act the privilege taxed is based on the fact of ownership, which Chief Justice Nicholson, of Tennessee, noted in the case of Lewis in that State, says is not an element of the privilege—the business or occupation constitutes the privilege, and not the ownership of property or its possession or keeping it.

The power of the Legislature to classify the subjects of an occupation or privilege tax is conceded, but can a tax be imposed on a merchant, banker, dentist, etc., exercising his occupation in a house rented by him, and impose no tax on the same persons exercising the same business, or occupation in a house owned by them.

Evidently this would be placing the tax not on the occupation, but on the question of ownership, a question which could in no legal sense determine the occupation.

The sleeping car business is different from the railroad business, and by the act under consideration, if the railroad is owned by the railroad company, then the sleeping car business by such railroad company is not a taxable occupation, but if the sleeping car company does not own the railroad, then the question of ownership determines the question of privilege in the exercise of the sleeping car business, there is no difference in the business, the sole difference is in the ownership, and the State does not in fact declare the occupation a privilege, but declares ownership or non-ownership to determine that question. Whatever may be the rule of law governing such an anomaly, there can be no doubt as to the fact that under this act ownership makes the same business not taxable to the owner that it would make taxable in case of non-ownership.

Now while some of the States have made it necessary to tax equally occupations, as all have made it necessary to tax property, so that taxes shall be *equal and uniform*, there underlies the exercise of the power in the State of Tennessee, a limitation contained in the grant of power.

The language is "the Legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct." The Legislature may declare a certain business to be a privilege, but it cannot declare the same thing to be, and not to be a privilege, by interpreting the qualification of ownership into it. The Legislature might just as well have interjected the question of sex or color as the *indicia* of the privilege. Again, we submit that there must be something in the character of the business to authorize the Legislature to declare it to be a privilege.

It cannot be that all and every species of avocation is within the caprice of Legislative power in this respect. Could the Legislature declare that carrying the mail was a privilege? Yet the letter carrier receives the letter stamped in Tennessee to be carried out of the State. Would the business of selling stamps to carry letters be declared a privilege? And yet it is carried on for the convenience of the public, by various parties in Tennessee, even with the *situs* of such business in view, no doubt. Could such mail rider be liable to tax if he hired the horse he rode, and not liable if he owned the horse? Are privileges the playthings of power, or are they governed by some rule, or measurable by some standard?

We say that there are limitations on the Legislative will in declaring what occupations can be made privileges. In Mabry *vs.* Tarver, 1st Hump. 98, the rule is "that an occupation is not a privilege unless prohibited in general by the law."

The universal decision of the courts of Tennessee is, that "a privilege is the exercise of an occupation, on business, which requires a license from some proper authority designated by a general law."

Chancellor Cooper, on an agreed statement of facts, decided in a Pullman case on this question. 3 Tenn., chap. 590 and 591: "The Constitution of this State having in express terms conferred upon the Legislature the power to

tax privileges, it has always been held by the courts that the Legislature may tax avocations by prohibiting them in general by the law, and then granting a license or permission to pursue them to those who will pay a tax therefor," on the principle of the old doctor who first threw his patient into fits because he was able to cure fits.

But if all the courts held this to be the law, we say there was no such law in Tennessee prohibiting the running or using of sleeping cars in that State, so as to authorize the declaration that such act would constitute a privilege.

We go farther and say, that the running and using of such cars needed no license to permit it, and no law could prevent it.

So far as the railroad companies are concerned, it is not a privilege, but the exercise of an irrepealable right in the management of their domestic affairs.

The Legislature has no right to dictate much less prohibit what cars railroad companies may run over their lines of road.

Railroad companies may give the privilege to foreign corporations to use their tracks, or may lease them, or may lease cars to run over them, and charge for such use and occupation; for it is the railroad's privilege that is granted by contract, and not a privilege of the State of Tennessee, which, in the sense of the Supreme Court decisions, is a grant to do a thing which is otherwise prohibited, sleeping cars do not run over these roads or use them, but constitute only a part of a railroad train of cars and coaches, carried by the railroad company over its own lines, and obtaining by contract with such railroad companies, every privilege and power, use and occupation, which is exercised on board the cars, passing through the territory of Tennessee. And, carrying, in the great tide of commercial travel, passengers from distant points, going through to meet connecting roads, traversing frequently nearly half a continent before they reach their destination, their business relation is exclusively with the passenger who has obtained a first-

class passenger ticket, to ride over the railroad to which the sleeping car is attached, and when such passenger enters the sleeping car, the privilege which he obtains is the accommodation of a sleeping car, advertised by the railroad company as being run in its trains of cars for the comfort of its passengers.

But the thing to be prohibited in the view of these decisions, is inter-state commerce, and it would be an insult to American nationality to entertain the idea, that States have the power to fetter the freedom of commerce. They might as well attempt to check the flowing of the waters of the Cumberland.

COUNTIES.

If we have been fortunate enough to show that the previous positions discussed are impotent to sustain the right of taxing as a privilege the Pullman cars used in carrying inter-State passengers by the State, it will require but little argument to overthrow the pretentions of towns and counties.

The Constitution of Tennessee clothes the counties in that State with no taxing power. Article 2, section 29, declares "the General Assembly shall have the power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively in such manner as shall be prescribed by law, and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

The General Assembly has not authorized the taxing power by counties in the act of 1877. The act shows upon its face the requirements of a report to one officer, and to that officer on a certain day, and the report is to be accompanied with the payment of one specific tax.

If the running and using sleeping cars through counties and towns in Tennessee, on railroads not owned by such sleeping-car companies, may be declared to be a privilege, the General Assembly has not so declared; the privilege

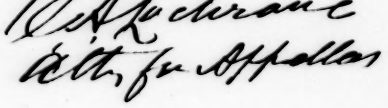
declared by the act is the running or using the cars in Tennessee on railroads not owned by such companies. We will not exhaust time on this subject. The General Assembly never intended to charge a privilege tax of $75 on each car going through the State, and confer a co-equal power of taxation on a county like Weakly, when the cars traverse twenty-eight one hundreths of a mile only, or a town like Galloway, where they run only forty one-hundredths of a mile. Such construction would be an insult even to Tennessee.

In concluding for the Defendant, we think we can safely rest this case on the very strong argument contained in the decision of the Court rendering the opinion under review. It has been with great difficulty we have been enabled to add anything by way of argument, and with great diffidence we have offered even the little support we have to its conclusiveness.

We have, we belive, without any question, shown that the Pullman Company, in the running and use of its cars in Tennessee is engaged in inter-State commerce; that some of the incidents to this business in receiving or discharging inter-State passengers in the State of Tennessee, is true, but the business as an occupation is carried on at its chief office in Kentucky, and over continuous lines of railroad through several States crossing Tennessee, in the conduct of its business, in connection with inter-State passengers. The tax on the two cars doing local business is not in controversy, and the inter-State business done with the cars in question here, is not a business done in Tennessee, and we know no more fitting conclusion, none that more closely and clearly covers the whole question than to quote from the decision itself:

"In the present case the Pullman Southern Car Company, a corporation of Kentucky, has no domicil in Tennessee, and is not personally subject to its jurisdiction for purposes of taxation, and the sleeping cars which it runs and uses upon the railroads of that State in the transporta-

tion of passengers into and from it, from and to other States have no *situs* within that State for purposes of taxation. They are not brought into the State for the purpose of being employed in a business carried on within it, and do not become a part of the mass of property within the jurisdiction of the State for purposes of taxation. They are in the State only as passing to and from it while in the act of transportation performed by virtue of a right secured by the owners of them, not by the authority of the laws of Tennessee, but by virtue of a right secured by the exclusive jurisdiction of Congress under the Constitution."



117-345-1

Supreme Court of the United States.

OCTOBER TERM, 1885.

P. P. Pickard, Comptroller of the Treasury,
vs.
The Pullman Southern Car Company, } *No. 933.*

AND (*CONSOLIDATED.*)

The State of Tennessee, Appellant,
vs.
The Pullman Southern Car Company. } *No. 836.*

BRIEF AND ARGUMENT FOR DAVIDSON COUNTY.

DODD & LANIER,
For Davidson County.

Marshall & Bruce, Stationers, Nashville.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

P. P. PICKARD, COMPTROLLER OF THE TREASURY,
vs.
THE PULLMAN SOUTHERN CAR COMPANY,
No. 933.

AND

(CONSOLIDATED.)

THE STATE OF TENNESSEE, APPELLANT,
vs.
THE PULLMAN SOUTHERN CAR COMPANY.
No. 936.

Brief and Argument for Davidson County.

DODD & LANIER, *for Davidson County.*

The General Assembly of the State of Tennessee, on the 16th day of March, 1877, passed an act, the 6th section of which reads as follows:

"That the running and using of sleeping cars, or coaches, on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared a privilege, and that they shall be required to pay to the Comptroller, by the first of July following fifty dollars for each and every of said cars, or coaches, used or so run over said road; and if said privilege tax herein assessed be not paid, the Comptroller shall enforce the collection of the same by distress warrant."

On the 7th day of April 1881, the said General Assembly passsed another act, entitled "An Act to Provide Revenue for the State of Tennessee, and the Counties thereof;" section 4 of which provides "that the rate of taxation on the following privileges shall be as follows, per annum,"

In this act, among other things mentioned, it is provided "that sleeping car companies shall pay an annual tax for each coach of seventy-five dollars."

The revenue act of 1883, among other things, provides "that

each sleeping car company doing business in this State shall pay a privilege tax, in lieu of all other taxes, of fifty dollars."

The 6th section of the revenue act of 1881 and 1883, provides "that all laws, or parts of laws, in conflict with this act be, and the same are, hereby repealed."

The 28th section of Article II. of the Constitution of the State of Tennessee provides "that all property, real or personal, or mixed, shall be taxed. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxation shall be equal and uniform throughout the State; but the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct."

And Section 29 of the same article provides "that the General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporate purposes respectively, in such manner as shall be provided by law."

In this connection it will be noticed that all the Acts of Assembly which provide for the raising of revenue for the State also provide for raising revenue for the counties therein, hence whatever property is assessed for State revenue is taxable for county purposes. And this is likewise true of privileges. If the State has a right to collect a privilege tax in this case, there can be no question of the right of the County of Davidson to do likewise. The cars or coaches of defendant are run through said county, and defendant has an office and agents in the same.

The defendant, however, insists, among other things, that the tax mentioned in the several acts referred to should not be collected, because the said acts are repugnant to Sec. 17, Art. II. of the Constitution of Tennessee, which provides "that no bill shall become a law which embraces more than one subject matter, that subject to be expressed in the title." It is insisted that the several acts mentioned embrace more than one subject matter, and are, therefore, unconstitutional. While it is true that several matters of taxation are mentioned in each of said acts, yet they are all comprehended in the general term "revenue."

The several acts mentioned have but one general object, and that is, revenue for State and county purposes.

This provision of our Constitution has been the subject matter of judicial consideration and construction in the State of Tennessee, in many cases involving the constitutionality of revenue acts as well as other acts of our General Assembly, and may now be considered well settled so far as our own State courts are concerned. In many cases the Supreme Court of the State has held that this provision of the Constitution is to be liberally construed, otherwise, say the court, "useful legislation would be unnecessarily embarrassed."

3 Lea, 82.
2 Lea, 427.
3 Lea, 333.

The general purpose of this provision is accomplished when the law has but one general object, which is fairly indicated in its title. To require every end and means necessary and convenient for the accomplishment of this general object, to be provided for in a separate act, as insisted on by defendant, would not only be unreasonable, but would actually render legislation impossible.

3 Lea, 82.
8 Heis., 519.

The last case cited was a revenue act embracing many matters of taxation, the title of which was "An Act to fix the State Tax on Property." The first section fixes the State tax on every one hundred dollars' worth of property at forty cents. The second section repealed a former act, while the third section amended an act passed at a former session. The fourth section increases the tax on privileges fifty per cent. upon the then existing basis. It was insisted that the act was unconstitutional because it embraced more than one subject matter. The court held otherwise, Chief Justice Nicholson delivering the opinion. "The general subject of the act," says the court, "is revenue, and each and every section has direct reference to the subject of revenue in its different phases. It cannot be said that there is the least incongruity among the provisions of the four sections; they have a natural if not necessary connection with and dependence upon

each other. Revenue is the general subject of the act. Its amount and disbursement from the treasury are the special objects provided for. It is clear that the act is not obnoxious to the objection that it embraces more subjects than one."

See also:

Cooley on Taxation, 144.
14 Ind., 195.
2 Iowa, 280.
19 New York, 119.
Cooley's Constitutional Limitations, 145.

"Only the general or ultimate object of the act need be stated in the title, and not the details by which that object is to be attained."

2 Lea, 428.

There are many other cases reported in our Tennessee Reports of like character and import, but the above are deemed sufficient. They are certainly conclusive of the question of the constitutionality of the acts referred to, so far as our State Constitution is concerned. To require as many different acts as there be different subjects of revenue, would fill our statute books with revenue acts alone, and the ultimate effect of such a requirement would be, in the language of the court, "to render legislation impossible." The act of 1877 has been construed by our Supreme Court, and was held, in a verbal opinion, to be constitutional, and the acts of 1881 and 1883, which are substantially the same as that of 1877, must likewise be considered free from constitutional objections, in the light of the decisions of the Tennessee Supreme Court. In considering these acts in reference to the provisions of our Constitution, heretofore referred to, the Federal Court will, in a large measure, if not altogether, we take it, be governed and controlled by the decisions of the Supreme Court of Tennessee, especially if these decisions violate no fundamental law or established principle in reference to the construction of statutes.

But it is also insisted that the act of 1883 repealed all former acts of the State Legislature in reference to the collection of State and county revenue, and therefore complainants are only entitled to collect a privilege tax imposed upon or required of

defendant for the years 1883–84. The act of 1883 only repealed so much and such parts of former acts as are inconsistent with it. Upon an examination of our several revenue acts the court will find that the one is a reproduction of the other, differing only with each other as to the amount of taxes to be assessed and collected on property, privileges, etc. Indeed, each succeeding Legislature virtually re-enacted the revenue act of its predecessor, differing simply, as before stated, as to the amount, etc. But even granting that the act of 1883 repeals absolutely all former revenue acts, the taxes in the way of privileges on the running of defendant's cars had been or were assessed at the time of the enactment of the repealing statute, and therefore having become a fixed and vested right, no repealing statute could affect it, unless so provided in express and positive terms. Each revenue act fixed the amount defendant was to pay in the way of a privilege, and hence the amount being fixed by the statute itself, the tax was assessed by law the moment defendant commenced running its cars through the State of Tennessee and County of Davidson. Taxes in this State, as soon as they are assessed, become a debt, and can be sued for and recovered before any court in the State of competent jurisdiction, in any form of action or procedure. Being a debt, or a claim in the nature of a debt, the State and county are not driven to or compelled to rely exclusively upon the remedy by distraint, prescribed in the statute, but may pursue any of the recognized methods or remedies for the collection of debt.

In the case of the State *vs.* Duncan, 6 Lea, 685, our Supreme Court say: "Taxes, when assessed, become a personal debt, and the government is entitled to all the remedies for their collection, including the ordinary suit at law, if it chooses to resort to that remedy."

Again, the same court say: "It has been long the settled law of this State, that taxes may be collected by warrant before a Justice of the Peace."

4 Lea, 54.

The taxes due from defendant then became a debt, under the operation of each revenue act, immediately upon the passage of the same, and being a debt fixed and established, subsequent acts

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could not interfere with this established vested right, unless expressly so provided in the repealing statute. Section 49 of the Code of Tennessee provides, however, that "the repeal of a statute does not effect any right which accrued, any duty imposed, any penalty incurred nor any proceeding commenced under or by virtue of the statute repealed." And the next section, among other things, provides that "words used in this Code in the past or present tense include the future."

But the defendant also insists that the privilege tax imposed in question is repugnant to that provision of the Constitution of the United States which says "Congress shall have power to regulate commerce with foreign nations, and among the several States." If the legislation complained of is an attempt upon the part of the Tennessee Legislature to regulate commerce between the States, then the several acts mentioned, so far as they impose a tax upon the defendant is concerned, are unconstitutional: otherwise they are not within the meaning of the provision of the Federal Constitution alluded to. In no sense, it is respectfully submitted, is the tax in question an attempt upon the part of the Legislature of the State to regulate commerce. It is not, in any sense, a tax upon commerce, but is only a tax, by way of a privilege, upon the vehicles employed in the transportation of commerce. Unquestionably the Legislature may tax whenever it has jurisdiction of the person, property or business. The defendant, being a non-resident, the State had no jurisdiction of its person, and therefore levied no tax upon this account, and could only levy a tax upon the property of defendant within the State, or upon its business in the way of a privilege. The State elected to pursue the latter course, and in it we are unable to see any sound constitutional objection. While the State cannot, under the constitutional provisions referred to, "regulate commerce," it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. It may tax the stage in which the mail is transported.

7 Howard, 402.

16 Wallace, 475.

"States may tax property, whether it belongs to individuals or non-residents."

2 Wallace, 428.

And if it can tax the property of non-residents, if it has the right to tax a business, profession or avocation at all, as a privilege, it has, unquestionably, the right to tax the business of a non-resident, as such, carried on or pursued within the limits of the State. "The subjects of taxation are persons, property and business, and the amount of taxation may be determined by the value of the property or its use, or its productiveness. It may touch business in the almost infinite forms in which it is conducted in professions, in *commerce* or manufactures, or in *transportation*."

15 Wallace, 321.
Same, 293.

It would seem, without citing other authorities, that the Supreme Court of the United States in the cases referred to, has settled beyond any controversy, that the State has the power to tax the property of a foreign corporation used within its borders for the conveyance of persons or property, and that such taxation may be laid upon the valuation, or may be an excise upon the privilege of using it in that mode. If this position be true, then there is no question of the constitutionality of the several acts under consideration. The Court is referred in this connection to the case of Lightburne *vs.* Taxing District, 4 Lea, 220, a case recently decided by the Supreme Court of our State. Other Federal and State authorities might be cited in support of the position assumed, but it seems to be so well settled that it is not deemed necessary to do so.

There can be no question as to the power of the State, under its Constitution, to declare the running of the cars of the defendant within its boundaries a privilege. Mr. Cooley lays down the general and well recognized principle in his work on Taxation. On page 384 he says: "The government may, in the discretion of its Legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any species of property and tax that only. * * * * The same is true of occupations," says the learned author; "Government may tax one, or it may tax all. There is no restriction upon its power in this regard, unless one is expressly imposed by the Constitution." Under the Constitution of the State of

Tennessee there is no restriction upon the power of the Legislature to declare any and all occupations a privilege. The language of the Constitution is: "The Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct." The Constitution having in express terms conferred upon the Legislature the power to tax privileges and to declare what shall be privileges, the Legislature may tax avocations, as such, which are not in themselves or in their nature privileges, by prohibiting them in general by the law and then granting a license to pursue them to those who will pay a tax therefor.

8 Heiskell, 475.

Same, 547.

3 Heiskell, 281.

There certainly can be no doubt as to the power of the State, through its Legislature, to declare the running of the cars of defendant a privilege.

T. L. DODD & DANNER.

Attorneys for Davidson County.